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PART ONE[+]
Alternative dispute resolution system in some European countries

The Part One deals with the most significant alternative dispute resolution systems in various European countries. We intend to introduce their historical development, however, this chapter will introduce mainly their recent systems.

Chapter 1
Settlement of labour disputes in Belgium

1. The Development of the Settlement of Labour Disputes

The Belgian settlement of labour disputes through other means than adjudication began at the end of the 18th century and emanated from various institutions.

The settlement of labour disputes arising from the individual contract of employment was first performed by the *Vrederechter/Juge de Paix* and by the *Werkrechtersraden/Conseils de Prud'hommes.*

The settlement of collective labour disputes originated in the *Nijverheids of Arbeidsraden.* In 1926 these *Nijverheids- of Arbeidsraden/Conseils de l'Industrie et du Travail* were supplemented by the *Ambtelijke Scheids- en Verzoeningsraden/Comités Officiels de Conciliation et d'Arbitrage* and established by the Government. At the same time settlement of collective labour disputes was also performed by the *Paritaire Comités/Commissions de Paritaires.*

At present these *Paritaire Comités* together with the *Sociaal Bemiddelaar/Conciliateur Social* are the most important institutions involved in the settlement of collective labour disputes. The *Paritaire Comités* are composed of representatives of the employers' organisations and the trade unions. They are usually chaired by *a Sociaal Bemiddelaar.* The function of *Sociaal Bemiddelaar* emerged from the inspection of health and safety in enterprises. Through the institution of the

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Sociaal Bemiddelaar the role of the Government in the settlement of labour disputes has become increasingly interventionistic.

2. The present system

2.1. The Labour Relations Service: the Joint Committees and the Mediation Officers

In Belgium the present institutionalised settlement of collective labour disputes is largely the result of the institutions described in the former sections of this Chapter and framed within the *Dienst* van *de Collectieve Arbeidsbetrekkingen/Service des Relations Collectives de Travail* (Labour Relations Service). The leading actors in the settlement proceedings are the *Verzoeningsbureaus/ Bureaux de Conciliation* (Conciliation Bureaus), established within the *Paritaire Comités/Commissions de Paritaires* (Joint Committees), and the *Sociaal Bemiddelaars/Conciliateurs Sociaux* (Mediation Officers). These institutions function on a voluntary basis. The competencies of both the *Paritaire Comités* and the *Sociaal Bemiddelaars* are statutory based.

2.1.1. The establishment and the statutory basis of the labour relations service

The *Dienst* van *de Collectieve Arbeidsbetrekkingen* is responsible for facilitating the settlement of collective labour disputes. The Service has been special branch of the Ministry of Employment and Labour since 1 November 1969 and is established in Brussels.

The assignments of the service are laid down in the Royal Decree of 23 July 1969, which provides for the establishment of the Dienst van *de* Collectieve Arbeidsbetrekkingen and its statute.[1] S. 2 of the Royal Decree states that the Office has the duty:

1. to contribute to the development and regulation of collective labour relations between employers and employees; to perform all administrative functions and assignment laid down in the Act of 5 December 1968 concerning collective agreements and Joint Committee;

2. to co-operate in the prevention of collective social disputes; to perform social mediation assignments; to report to the Minister of Employment and Labour with respect to social relationships within a branch of industry, within a sector of industry or within a particular company.[2]

The tasks of the Service are distributed over three divisions of the *Dienst van de Collectieve Arbeidsbetrekkingen,* that is the Directorate of General Affairs which is responsible for the guidance and administration of the *Paritaire* Comités and the registration of the collective agreements, the Secretariat of the *Sociaal Bemiddelaars* and the Directorate Research and Documentation.

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[1] The following amendments were effectuated by the Royal Decree of March 1977.

[2] Royal Decree of 23 July 1969, Monit. 30 July 1969.

The Directorates General Affairs and Documentation and Research do mainly preparatory work. Apart from their performance as chairpersons of the *Paritaire Comités*, the *Sociaal Bemiddelaars* are chiefly involved with the mediation work of the Service.[3]

Since the establishment of the Service its competence is extended continuously, not only through various Acts but also through regulations with respect to *Paritaire Comités* and through provisions in collective agreements.

2.1.2. The organisation of the labour relations service

The *Dienst van de Collectieve Arbeidsbetrekkingen* is staffed by 149 civil servants.[4] At the top of the Service there is the *Administrateur-Generaal* (Administrator General).[5] He/she is the overall manager of the Service and directly responsible to the Minister of Employment and Labour and is recruited from among the *Sociaal Bemiddelaars.*[6] The requirements to qualify for this functions are laid down in s. 10 of the Royal Decree of 23 July 1969.[7] His/her main responsibility is to ensure that the Service supports and facilitates collective bargaining by providing the *Paritaire Comités* with logistic support and the settlement of collective disputes.

2.1.3. The Labour Relations Service: conciliation or mediation?

Preferably the Belgian Government does not intervene in the collective bargaining machinery, since the autonomy of the parties should be left intact as far as possible. Nevertheless, the Government plays an important role in the settlement of collective labour disputes through the intervention of the *Sociaal Bemiddelaars* which function within the *Dienst van de Collectieve Arbeidsbetrekkingen.* The Service assesses the conciliation/mediation task as one of its primary responsibilities.[8] In Belgian labour relations not much value is attached to the distinction between conciliation and mediation.[9] This might be the reason why in the French text of the legislation the *Sociaal Bemiddelaar* is translated as *Conciliateur Social.* In the opinion of the *Administrateur-Generaal* the distinction is regarded highly artificial since both the *Paritaire Comités* and the *Sociaal Bemiddelaars* are making settlement proposals. If a distinction should be made, it is considered that conciliation is focused on contributing to the negotiations between the parties and offering *goede diensten* (good services). The focus of mediation is on making non-binding settlements agreements. The French

[3] The present organization of the Labour Relations Service differs slightly from s. 3 of the Royal Decree of 1969 which says that the Service has a Directorate for the Joint Committees and Collective Labour Agreements, a Directorate for the Mediation Officers, and a Secretariate.

[4] The Labour Relations Service kindly provided us with these data.

[5] S. 4, Royal Decree of 23 July, Monit. 30 luly 1969.

[6] At present Mr. J.L. Rombouts is the *Administrateur-Generaal.*

[7] To perform this function a person must be a civil servant, 35 years of age, physically able and have at least ten years of experience in the relationships between employers and workers/employees.

[8] This was said to us during the meeting we had with the *Administrateur-Generaal*, Mr. J.L. Rombouts, in April 1992.

[9] J.L. Rombouts (1992), o.c., p. 12.

do distinguish between conciliation and mediation, as do the British as practised in collective labour disputes.

2.2. The Joint Committees

In Belgium institutionalised collective bargaining and prevention and resolution of collective disputes largely take place through the *Paritaire Comités/Commissions de Paritaires* under the chairmanship of the *Sociaal Bemiddelaars.* On 1 January 1993 101 *Paritaire Comités* and 60 *Paritaire Subcomités* were administrated by the Service.[10] In these committees 3034 persons take part of which the majority of the members sit in more than one *Paritaire Comité.* On average *a Paritair Comité* has 20 members.

The present statutory framework of the *Paritaire Comités* is laid down in the *Wet betreffende de Collectieve Arbeidsovereenkomsten en de Paritaire Comités* (Act regarding the Collective Agreements and the Joint Committees) of S December 1968. This Act does not cover civil servants.[11]

The conciliation competence of the *Paritaire Comités* is not exclusive and that also applies to the *Sociaal Bemiddelaars.* The Act of 1968 allows every person to act as a third party on the condition that he is fully accepted by the parties.[12] It happens that a local or national politician acts as a mediator on a purely *ad hoc* basis on his own motion or on the request of the parties.[13]

The importance of the *Paritaire Comités* for Belgian labour relations is beyond doubt. Often they are regarded as the legislators of labour relations. Within these committees substantive labour regulations are shaped, for example through the conclusion of collective agreements. The regulations of the *Paritaire Comités* can be regarded therefore as a major source of social law. Also their importance is due to their contribution to the settlement of labour disputes.

S. 35 of the Act of 1968 allows the King to set up *Paritaire Comités* either on his own motion or on the request of one or more professional organisations of employers and workers/employees. The competence of the King to establish *Paritaire Comités* on his own motion is new. The Decree-Act of 9 June 1945 allowed the parties alone to take such initiatives. The range of the Act of 1968 is wider. The *Paritaire Comités* are no longer permitted in particular private sectors only. The 1968 Act has a general scope. As a result of this extension all existing *Paritaire Comités* were newly established.

2.2.1. Functioning

The private regulations of the *Paritaire Comités* and the *Paritaire Subcomités,* which are administered by the Directorate of General Affairs, contain the proceedings of their operations.

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[10] The Service holds a list of all the *Paritaire Comités,* the *Paritaire Subcomités* and their chair-persons. This list is published annually.

[11] S. 2, para. 3, *ss.* 1 of Act on Collective Agreements of 5 December 1968.

[12] M. Rigaux (1986), o.c., p. 29.

[13] Ibid., p. 29.

The *Paritaire Comités* meet on the initiative of either the chairperson or on the request of one of the organisations represented. There are *Paritaire Cornités* which meet regularly, for instance, twice a month or on *an ad hoc* basis. The meetings are not public. The actions of or within the *Paritaire Comités* have legal effect only when at least half of the representatives of the employers and half of the representatives are present. The members have the right to vote. The chairperson, deputy chairperson and the secretaries do not. Decisions are taken by unanimity of the members present.[14]

2.3. The Mediation Officers

The Belgian Mediation Officers *(*Sociaal *Bemiddelaars)* are high ranked civil servants. There are 22 Mediation Officers of whom four are Senior Mediation Officers, nine *Sociaal Bemiddelaars* and nine *Adjunct* Sociaal *Bemiddelaars.* Of these 22 there are three female *Sociaal Bemiddelaars.* The number of Mediation Officers has been extended considerably since the first two were appointed in 1947. As far as the performance of the function is concerned the differences in rank are theoretical.[15] Financially there is a difference.

The Mediation Officers are especially assigned to:

- watch over the prevention of social disputes and to follow the outbreak, the course and the termination thereof;
- fulfil every mediation assignment;
- keep in permanent contact with the professional organisations of the employers and the employees and with the Social Inspectors and Controllers of the Ministry of Employment and Labour;
- draft all reports with respect the social relations within a branch of industry, within a sector of industry or within a particular industry.

The Mediation Officers are recruited from various categories such as organisations of employers and workers/employees. Special education is not required. Therefore *Sociaal Bemiddelaars* may be appointed without having a university degree. The trend is that for a number of reasons, but particularly because of the increasing complexity of labour regulations, persons without a particular degree are seldom appointed.

The first Mediation Officers learned the profession on the job and this is still the practice today. There is no special training course as for example the ACAS in GB has developed for the individual and collective conciliators.

The Mediation Officers may face disciplinary measures in case of malfunctioning. Such measures are taken by the Minister on the advice of the *Administrateur-Generaal* who has the responsibility for carrying out. This illustrates again that the *Sociaal Bemiddelaar* is not a regular civil servant. The result of his malfunctioning may be that he is assigned with less mediation work.

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[14] This norm is only deviated from when other Acts require it. S. 24 of the Act of 1968 requires that for the conclusion of collective agreements all members must agree.

[15] The rank of *Eerste Sociale Bemiddelaar* or *Super* Sociaal *Bemiddelaar* (Senior Mediation Officer) was introduced by the Royal Decree of 8 March 1977. This Decree did not allow persons to become Mediation Officer or Administrator General who had not functioned as associate mediation officers first. It was again amended by Royal Decree of 13 January 1978.

2.4. The Mediation Procedure of the Joint Committees and the Mediation Officers in Practice

The *Paritaire Comités* and their *Verzoeningsbureaus/Bureaux de Conciliation* or the parties themselves are responsible for the settlement of collective labour disputes. According to Rombouts the settlement of collective labour disputes through conciliation and/or mediation and collective negotiations are part of *een zelfde* sociaal *proces* (one and the same social process).[16] The settlement of individual disputes is allotted to the *Arbeidsrechtbanken* since 1970. This division, however, is less strict then it seems. *Paritaire Comités* may also be involved in individual disputes.[17] Based on figures of the years 1962 and 1963 Devisé says that the *Paritaire Comités* sometimes even functioned as the porch to the *Werkrechtersraden.* At present also individual disputes are handled by the *Paritaire Comités.*

The normal pattern for the resolution of collective labour disputes in Belgium is that first conciliation is tried and, if necessary, mediation is resorted to. The institutions involved in this process are the *Verzoeningsbureaus* of the *Paritaire Comités* and, if necessary, the *Sociaal Bemiddelaars.* There is no significant role to play for the *Arbeidsrechtbanken.*[18] The tradition of voluntarism expects parties to make their own provisions and to resort to their own procedures in case of a dispute.[19] Conciliation and/or mediation are strongly intertwined in the Belgian system of collective bargaining and practised either on a formal or an informal basis, unlike „formal" conciliation as practised by the ACAS conciliators. Informal conciliation/mediation is called "preventive" conciliation since it is practised when there is yet no open conflict. It takes place during the initial stage of collective bargaining when the spokesmen of both sides of industry are still deliberating with each other and with their own rank and file. Formal conciliation is sometimes typified as „curative".

2.4.1. The conciliation bureaus

The assignment to prevent and settle disputes between employers and Workers/employees as laid down in s. 38 of the Act of 5 December 1968 is not very explicit. How conciliation/mediation should be performed by the *Paritaire Comités* is not clear. The Royal Decree of 6 November 1969 *tot Vaststelling van de Algemene Regels voor de Werking van de Paritaire Comités en Paritaire Sub joint comittees* (on the Determination of the General Rules for the Functioning of the Paritaire Comités

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[16] J.L. Rombouts (1993), o.c., p. 4.

[17] H. Devisé (1964), o.c., p. 560. The Treu Report (1984), Luxembourg, p. 9. J.L. Rombouts (1992), o.c., p. 14.

[18] Scholarly opinion in Belgium is, however, divided on the issue of where to draw the boundary line of the competence area of the *Arbeidsrechtbanken.* After discussing the different points of view, Rigaux concludes that the strongest evidence supports of the view that *Arbeidsrechtbanken* do have jurisdiction in collective disputes over rights. M. Rigaux (1986), o.c., p. 17. In practice, collective disputes are not often referred to the *Arbeidsrechtbanken,* but more frequently to the Presidents of the *Rechtbanken van eerste aanleg* (the regular courts of firt instance).

[19] M. Rigaux (1986), o.c., p. 18.

and the Paritaire Sub-jointcomités) is more clear. Nevertheless, the Royal Decree, as the 1968 Act, does not give any indications on the limitations of their competence.

A. Stage I: how the Conciliation Bureaus become involved. When the representatives of the employers and the workers/employees at the level of the enterprise fail to bring about a settlement, the *Verzoeningsbureaus* of the *Paritaire Comités* become involved. Although the Belgian system of labour dispute settlement is voluntary, the parties are nevertheless expected to follow the proceedings of the *Verzoeningsbureaus* as provided for in the private regulations of the *Paritaire Comités,* before they decide to strike or to have a lock-out. Such regulations, however, cannot prevent wildcat strikes completely. The proceedings of the *Verzoeningsbureaus* are usually standardised. Sometimes a *Verzoeningsvergadering* (Conciliation meeting) is convened at the level of the enterprise before the regular (formal) bargaining structure is resorted to.[20]

General practice is that the *Verzoeningsbureaus* are asked to intervene by the party most concerned on the basis of a *bondig dossier* (firm file). Our survey confirms that most of the time, one or both of the disputing parties take the initiative to involve the *Verzoeningsbureaus.* Less frequently, the members of the *Verzoeningsbureaus* take the initiative to conciliate. Even less frequent are those cases whereby the Chairman of the *Paritaire Comités* or Sociaal *Bemiddelaars* take the initiative. Occasionally, it is the Minister who asks the *Verzoeningsbureaus* to interfere. According to the respondents in our survey, the reasons for parties to involve the *Verzoeningsbureaus* are: the expectation finding the Chairmen-Sociaal *Bemiddelaars* siding with them and finding a way out of a deadlock, preferably without loss of face. Parties who are signatories to a collective agreement are on the whole more co-operative and careful of safeguarding the balance of power established in the agreement. Non-signatory parties, particularly employers, are not very motivated to co-operate.

B. Stage II: development of the conciliation process. After the *Verzoeningsbureaus* have been informed of the dispute they arrange a hearing. The function of such hearing is to obtain information by learning the points of view of the parties and by asking them questions. The party who asked for the intervention of the *Verzoeningsbureau* is given the opportunity to explain his/her view of the dispute first. At this stage the *Verzoeningsbureaus* do not voice their opinion, because after this hearing, which is an information round, the chairpersons suspend the hearing to deliberate together with the other members of the *Paritaire Comités.* The suspension of the hearing may have an important function. It often happens that during this pause the members of the *Verzoeningsbureaus,* with mutual agreement and in consultation with the chairpersons, take the pulse of their organisations of which they are the representatives. They try to find out whether some of the proposals of the *Verzoeningsbureaus* may have any chance of success. It gives them an excellent opportunity to learn the difficulties which may be considered in the final proposal of the *Verzoeningsbureaus.* This kind of actions, which can be regarded as side meetings, have a rather informal character which match the Belgian system. The parties dominate the process and their autonomy is left intact as far as possible. During this stage the chairpersons stay aloof. These

[20] J.L. Rombouts (1992), o.c., p. 6.

actions belong to what is named *collectieve sociale bemiddeling* (collective social mediation), but consultation may be a better term.[21]

After their return to the *Verzoeningsbureaus* the members try to formulate a unanimous point of view. The *Verzoeningsbureaus* continue, after the deliberations, the hearing to communicate their viewpoint to the parties. The parties are not obliged to accept the proposal since the whole procedure of conciliation/mediation is based on voluntariness. Nevertheless, the majority of proposals as recommended by the *Verzoeningsbureaus* are accepted. Our survey confirms that 75% to 100% of disputes referred to the *Verzoeningsbureaus* during 1992 were conciliated successfully. The 100% figure is explained by the respondents from the excellent atmosphere in the *Verzoeningsbureaus*. This depends, however, on the particular branch of industry.

The proposals for the settlement of the dispute are made by the representatives of the parties. A neutral approach by the *Sociaal Bemiddelaars* at this stage is essential. Expressing ideas on the matter openly can imply that one of the parties or both may refuse to accept their intervention in the future. They should keep a low profile. The whole process through their position is delicate.

Usually one or two meetings are needed to reach agreement. At average four to six hours, including preparation time, are spent on the completion of a conciliation/mediation procedure. Some attempts are more difficult such as the restructuring and close-down of enterprises and disputes where strikes or work-ins have already started. The meetings of the *Verzoeningsbureaus* usually take place at the offices of the Service in Brussels. There are *Paritaire Comités* which have their own facilities. Parties are not often represented by lawyers. The number of instances in which they are involved, however, is growing. In some branches up to 60% of the disputes submitted may involve lawyers. Lawyers are considered to have a distinct negative impact on the conciliation/mediation process. They tend to be legalistic and do not have an open eye for the positive impact of consensus on the relationship between the parties. Rather, they try to involve the courts in order to have a yes-or-no solution. According to one of the respondents judges are not professional conciliators.

C. Stage III: the Settlement and its legal consequences. If there is agreement, the dispute is terminated. The agreement may or may not have a legal status. Frequently, the conciliated settlements take the character of an recommendation of the Conciliation Bureau. Such recommendations are only morally binding. They are not usually ignored as this may jeopardise the *sociale vrede* (social peace) within a branch of industry. Settlements may also result in the conclusion of a new collective agreement or a change in an existing agreement. In those situations, the settlement agreement, being a collective agreement, becomes legally binding between the parties once it is *neergelegd* (officially registered or deposited) with and approved by the Minister of Employment. Approval follows if the agreement conforms with the ss. 13-16 of the 1968 Act on Collective Agreements.[22] If the settlement constitutes a collective agreement and the parties presented do not have a proxy to sign, further consultations are necessary, for instance, with the full *Paritaire Comité* if the agreement refers to a particular branch

[21] Ibid., p. 28.

[22] The procedure is laid down in s. 18 of the 1968 Act. This ministerial approval is to be distinguished from the approval needed to make an agreement binding *erga* omnes.

of industry.[23] In any case, the respondents hold that parties may not unilaterally change their minds once agreement has been reached. The conciliated settlement is laid down in a standard form, which is signed by the parties, the members of the *Verzoeningsbureaus* and/or the Chairmen-Sociaal *Bemiddelaars.* When the conciliation/mediation fails a minutes of non-conciliation is drawn up. Both the successful and the non-successful attempts at conciliation/mediation by the *Verzoeningsbureaus* are communicated to the Ministry through the Chairman-Sociaal *Bemiddelaar.*

2.4.2. Chairman or mediator?

Unanimity within the *Verzoeningsbureaus* is not always reached due to disagreement among the members of the bureau or a just solution cannot be found. If that occurs the Chairmen-Sociaal *Bemiddelaars* may put forward a proposal not directly opposed by either party and whereby harmony can be kept. They can also suggest to the parties to opt for mediation. This emphasises their role of *Sociaal Bemiddelaars.* They can decide to continue co-operation with the other members of the *Verzoeningsbureaus* and give their opinion clearly and thereby becoming less tied of the *Verzoeningsbureaus.* They can also suspend the hearing to consult the parties separately without the members of the *Verzoeningsbureaus.* At all times the chairpersons-Soci*aal Bemiddelaars* must carefully weigh which options are most successful.

They rely on themselves fully, Finally they can interfere on their own motion or on the request of the Minister. They will then assist and advise the parties independently. By then their role has changed into that of the *Sociaal Bemiddelaar.*

2.4.3. The mediation officer

The conciliation/mediation practice of the *Sociaal Bemiddelaars* can now be described briefly, as there are few differences from their role as chairpersons of the *Verzoeningsbureaus.* The most important difference, as we saw, was that the *Sociaal Bemiddelaars* assume a more robust role than the role they performed as chairmen. As one of the *Sociaal Bemiddelaars* expressed it to us: *ge gaat van pit veranderen* (you are then shifting to a different gear),

Through various channels the *Sociaal Bemiddelaar* is notified of social conflicts. They may be familiar with many of the disputes through their chairmanship of *Paritaire Comités.* Contacts with the organisations of employers and workers/employees and access to the reports of the Social Inspectors are other important sources of information. On their own motion or on the request of a party or the Minister of Employment and Labour they commence to mediate. The primary purpose is to renew the negotiations, To reach this, they are free in adapting strategies which they consider appropriate.

[23] Such further consultations may not be necessary if it concerns an agreement at enterprise level and the responsible employer and union delegates are involved.

The *Sociaal Bemiddelaars* and chairpersons of *Paritaire Comités* we interviewed, were all very positive about their continuous involvement in the whole process of collective bargaining. This fact, and the relationship of confidence that is thus being built up towards a particular branch of industry, is thought to be highly instrumental for the success of this Belgian institution.

Summary

In Belgium the *Vrederechter/Juge de Paix* was the first institution primarily responsible for the settlement of labour disputes arising from the individual contractual relationship through other means than adjudication, that is conciliation. The role and importance of this institution, framed on the French *Juge de Paix,* decreased when the *Werkrechtersraden/Conseils des Prud'hommes* were established. The first *Werkrechtersraden* were established in 1811 and 1813 respectively. The *Werkrechtersraden* originated in the French *Conseils des Prud'hommes.* Their primary function was to conciliate conflicts arising from the individual contract of employment. From 1842 onwards the Belgian Government itself regularly promulgated legislation Concerning the *Werkrechtersraden.* The reasons to change the legislation was democratisation.

After World War II the *Sociaal Bemiddelaars* were introduced as professional mediators. They derived their mediation function from the *Sociale Inspecteurs* and *Sociale Controleurs* who were responsible for inspecting health and safety within the factories. The *Sociaal Bemiddelaars* together with the *Paritaire Comités* are presently involved in the settlement of collective disputes. The *Sociaal Bemiddelaars* were given a statutory footing on 27 July 1964. Their assignments were further elaborated in the *Wet betreffende de Collectieve Arbeidsovereenkomsten en de Paritaire Comités* of 5 December 1968 and the Royal Decree of 23 July 1969.

The *Paritaire Comités* and the *Sociaal Bemiddelaars* are assisted by the *Dienst van de Collectieve Arbeidsbetrekkingen.* This Service was established on 1 November 1969. The overall manager of the Service is the *Administrateur- Generaal.*

The present Belgian settlement machinery is based on voluntariness, although the role of the Government has become more interventionist.[24]

[24] This sub-chapter based mainly on the work of Annie de Roo and Rob Jagtenberg: Settling Labour Disputes in Europe, Kluwer, 1994.

Chapter 2
Settlement of labour disputes in Denmark

According to our knowledge, Denmark was the first European country to recognise trade unions. This happened as early as 1849. Collective bargaining developed during the second half of the 19th century at various levels. In 1898 the trade unions and organisations of employers associations set up a joint body for the settlement of labour disputes as a private initiative. Its main task was to decide whether existing collective agreements were respected.

In September 1899 the first nation-wide agreement was concluded. This agreement, the *September Forget* (September Agreement), became the basic document for the industrial relations system in Denmark. It laid down some essential "rules of the game".[25] Strikes were accepted, but due notice had to be given.

In 1908 the August Commission was established inquiring into the possibilities to set up arbitration courts or labour courts. The Commission was composed of representatives of the leading union *Landsorganisationen i Danmark* (Danish Federation of Trade Unions), abbreviated *Lo* and the leading employers" association *Dansk Arbejdsgiverforening* (Danish Employers" Federation), abbreviated DA and an independent chairman. This Commission distinguished between disputes over interests and disputes over rights. For the first category of disputes, that is disputes arising from the negotiation of new collective agreements, the use of legal force was perceived as the appropriate means to settle disputes. In order for strikes and lock-outs to be lawful, rules about prior notice had to be observed. The services of an independent conciliator were considered to be appropriate in finding a way out in situations of deadlock. The *Forligmandsloven* (Public Conciliator) was introduced on a statutory basis through the Act on Public Conciliators of 1908.

For collective disputes over rights, a further distinction was made between disputes over the interpretation of existing collective agreements and disputes arising from alleged infringements of an existing collective agreement. For the first subcategory of disputes, it was held that parties themselves should adopt settlement clauses into the collective agreements concluded in their particular branch of industry. Should parties have difficulties in drafting such a clause, then they could lean upon a set of model rules, drafted under the auspices of the August Commission between the Lo and DA. For the subcategory of collective disputes arising from alleged infringements on existing collective agreements *a Arbejdsretten* (Labour Court) was suggested and established through the Labour Court Act of 1910.

A separate Arbitration Court was set up in the same year to deal with disputes arising from alleged infringements of the framework agreement of September 1899. Thus a multi-track system of dispute settlement evolved in which the distinction between disputes over interests versus disputes over rights was predominant. This multi-track system still is, although there have been minor changes. The Labour Court Act was replaced by a new Act in 1973, retaining the basic principles of the old legislation.

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[25] P. Jacobsen (1989), Denmark, in *International Encyclopedia for Labour Law and Industrial Relations*, (R. Blanpain ed.), Deventer.

The Public Conciliator system of 1910 was modified in 1927, when the number of Public Conciliators was extended to three. The amendment of 1927 also explicitly provided that the Public Conciliators could intervene in collective disputes, either on their own motion or upon the request of either party.

These procedures were established for disputes of a collective nature. It may be questioned whether individual labour disputes, as a distinct category, are at all distinguished from collective disputes in Denmark. The answer to this question is: hardly. The reason for this may be that the Danish labour relations system is characterised by a high degree of unionisation: 80% of all employees is member of a trade union. The majority of employees in Denmark is covered by a collective agreement.[26]

Typical for the Danish system of collective bargaining machinery is the hierarchy of collective agreements, concluded at the national, industry, and enterprise level. In the conclusion of collective agreements the central organisations of employers and employees, *Lo* and DA, play a predominant role. At the top of this hierarchy is the Economic Advisory Council, a tripartite agency where all major social policy issues are discussed. For example, projects of new employment legislation are usually first discussed in consultation with the central organisations of employers and unions.

Therefore, industrial relations in Denmark are regulated by framework agreements and detailed collective agreements primarily and only to a small extent by legislation. Issues regulated by collective agreement in Denmark are, for example, full pay during periods of illness and paid maternity leave. Such issues are in other countries of the European Community regulated by law primarily.

Detailed rules are worked out to regulate the entire bargaining machinery , process. All renewals of collective agreements have to take place at the same time. Most collective agreements contain a peace obligation during the period of validity. Apart from that, the first basic collective agreement, that i is the September Agreement of 1899 and revised in 1960, still provides that notice must be given prior to a strike.

As in other European countries, the Danish bargaining underwent a process of decentralisation. For example, wages are increasingly negotiated at workplace level. The central level, however, still assumes an important role" in devising national framework agreements. Both sides of industry are eager to retain control over the system of nation-wide bargaining. It gives them an opportunity to influence the national economy. Due to the fact that a majority of individual employment contracts is covered by collective agreements has effected the settlement of individual labour disputes. Such disputes often involve the contents of collective agreements. Therefore, it is the Labour Court or one of the conventional conciliation/mediation committees that hear the disputes. Yet, in 1987 a special arbitration board, the Board of Dismissals, was established to deal with disputes arising from individual dismissals, but only after some preliminary steps were taken. These institutions have in common that their jurisdiction is exclusive. It implies that disputes under their jurisdiction cannot be brought before the regular courts. Neither is it possible to appeal against a decision of the Labour Court. The Labour Court has jurisdiction over all disputes arising from an alleged infringement of collective agreements. The Court consists of

[26] The Danish Ministry of Labour (1993), *Labour Market Consensus*, Copenhagen.

twelve lay judges nominated by the two parties, of which six are nominated by the employers and six by the trade unions. As the jurisdiction of the Labour Court also extends to the public sector, two out of the six representatives for the employers" side are high ranked civil servant managers. The lay judges together elect a president, who is usually a judge of the Supreme Court. Because of its composition, the Labour Court is regarded by both sides of industry as their "own" court, although it is based on legislation.

The Labour Courts may impose penalties on individuals and organisations for breach of collective agreements, including the breach of a peace obligation. If employees refuse to accept that a strike called out constitutes a breach of the agreement, the case is listed for a proper hearing. In the period leading up to the hearing the president makes mediation attempts in 90% of all cases.[27]

The other institution of major importance in Danish labour dispute settlement is the Public Conciliator. There are at present three Public Conciliators, and thirteen assistant Conciliators.[28] They may operate as a Board of Conciliation. In that case, they choose a chairman from their midst.

The Public Conciliators are appointed by the Minister of Labour for a period of three years. It is watched that not everyone of them is replaced at the same time. The Act on Public Conciliators, dating back to 1910, as amended in 1927, was complemented by a Regulation in 1958, which provides more detailed rules for the mode of operation of the Public Conciliator.

According to s. 4 of this Regulation of 1958, the Conciliator may indicate to the parties which concessions he would regard instrumental in achieving an amicable settlement. The Public Conciliator may also advise the parties to resume bilateral negotiations, if he has the impression that the parties have not yet sufficiently discussed the subject matter at hand. The Conciliator, therefore, has powers to conciliate as well as to mediate.

The parties appearing before the Conciliator are responsible for providing all the materials and documents needed.

An aspect of the procedure before the Public Conciliator that is regarded as unique, is that the Conciliator, upon the submission of a request to conciliate, may decide that a strike or lock-out, on which notice has been given, is to be postponed. Such a "decision" of the Conciliator cannot be contravened easily by a union, as the balloting rules normally require a qualified majority for ignoring the Public Conciliator's proposal.[29]

If the Conciliator fails to reach an agreement, then political intervention may take place.[30]

In practice, the outcomes of political intervention tend to be similar to the proposals made by the Conciliator. This reinforces the credibility and authority of the Public Conciliator system.

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[27] P. Jacobsen (1989), o.c.

[28] Commission of the European Communities, Mutual Information System on Employment Policies (MISEP) (1992), Basic *Information Report on Denmark; institutions, procedures and measures,* Brussels/Leiden, p. 15.

[29] The Danish Ministry of Labour (1993), o.c., p. 6.

[30] Ibid., p. 7.

The Danish system is regarded as very successful. For years, no major industrial dispute has arisen in Denmark in connection with the renewal of a collective agreement.[31]

Compared to the Labour Court and the Public Conciliator, the Board of Dismissals is a novel institution.

A right not to be unfairly dismissed has been entrenched in statute law for employees in the public sector only. For the private sector the provisions on unfair dismissal are laid down in the *Hovedaftalen*, the Basic Collective Agreements between *DA* and Lo. Section 4.3 of the Basic Agreement of 1973, as amended in 1993, provides that, although the employer basically has an unfettered right to manage and a right to dismiss, dismissals are held to be unfair if there is no reasonable ground. A reasonable ground must lie in either redundancy, or in malfunctioning of the employee.

The Board of Dismissals can only become involved in the following manner when an employee is dismissed, he/she is entitled to be informed of the reason for the dismissal. If he/she is not satisfied that the reason is sufficient ground, he/she is entitled to have the question taken up by his shop steward. If this does not result in a solution, then the union of the employee has a right to have the question taken up with the organisation of the employer. If this also does not produce a solution, then the union is entitled to have the question decided by the Board of Dismissals. The Board can order reinstatement of the dismissed employee.

The predominant role of the unions is remarkable, in this procedure just as elsewhere in the Danish labour relations system. This system is strongly institutionalised and highly collectivised. An interesting question is which changes European social policy will bring for Denmark.[32]

[31] The Danish Ministry of Labour, the Danish Employers' Confederation and the Danish Confederation of Trade Unions (1991), *Labour Relations* in *Denmark, The Self Regulatory* System, Copenhagen, p. 15 and p. 24.

[32] Annie de Roo and Rob Jagtenberg: Settling labour disputes in Europe, Kluwer, 1994. pp. 321-325.

Chapter 3
Settlement of labour disputes in France

1. The Development of the Settlement of Labour Disputes

Just as in Britain, the only category of labour disputes recognised for a long time in France was individual labour disputes. During the (first) Napoleonic Empire, a new multi layer structure of courts was set up, entrusted with a general civil and criminal jurisdiction.[33]

Within this court system, disputes arising between masters and servants were brought under the jurisdiction of the *Juge de Paix* (Justice of the Peace).[34] The *Juge de Paix* constituted the grassroots level tribunal in the French court hierarchy. Unlike the British Justice of the Peace, the French *Juge* de *Paix* had jurisdiction in private law disputes primarily.[35] As early as 1806, however, a special court was authorised by the Emperor to hear particular kinds of individual labour disputes in the city of Lyon. This special court was the *Conseil de Prud'hommes,* which gradually assumed a wider jurisdiction and spread all over the country, eventually supplanting the jurisdiction of the *Juge de Paix* in labour disputes. Chronologically, the *Conseil de Prud'hommes,* although essentially a remainder from the preindustrial era, was the first specialised institution dealing with labour disputes in industrialised Europe, involving employers and workers as individual conciliators and/or judges. This mere fact made the *Conseil* a model, frequently studied or even copied by other European nations, including Great Britain. The *Conseils* have functioned continuously until the present. As an existing institution for labour dispute settlement, albeit with a long history, the *Conseil* is discussed separately in the next section.

Other statutory procedures for the settlement of labour disputes outside the regular courts first emerged towards the end of the 19th century, notably in 1892.

2. Conciliation and arbitration under the Act of 27-12-1892

One of the underlying aims of the Waldeck-Rousseau Act of 1884 was to encourage friendly negotiations between the unions and employers. It was expected that the number of strikes would decrease, now that all barriers preventing the unions from negotiating as an economic interest group were broken down. This expectation was not justified. The country soon faced new outbursts of strikes. As a consequence, several proposals for legislation were submitted in Parliament, all addressing the issue of how

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[33] It would be wrong to say that as the result of the Revolution in 1789, a new court structure was conceived and implemented at once. Rather, a number of blueprints and changes to these blueprints were enacted during the entire revolutionary era of 1790-1810, under various political regimes. Reference is made to section 4.3.1.1. below for a more detailed analysis.

[34] S. 9 and s. 10, *ss.* 5, of the *Goi* of 16 August 1790 which was conceived by ihe *Assemblée Nationale* Constituante and established a nationwide system of courts and tribunals.

[35] C.M.G. ten Raa, Comparaison historique entre la justice de paix sur le Continent et le "justice of the peace" en Angleterre, in *Conservare Jura.* Actes *des journées internationales d'histoire du droit et des* institutions (P.L. Néve and O. Moorman van Kappen eds.), Deventer 1988, p. 167-174.

to stop collective disputes and encourage industrial peace through conciliation or arbitration. These proposals, as well as the resulting Act are discussed below.

2.1. The proposals for an Act on conciliation and arbitration

The first proposals for legislation were submitted in one public and several private member bills.[36] The proposals made differed from each other on three points:

- whether recourse to conciliation or arbitration should be voluntary or compulsory, and arbitral awards should be binding in law or not;
- whether conciliation and/or arbitration should be conducted on *an ad hoc* basis or through a permanent institution;
- whether an authority from outside the branches of industry concerned should be involved, either as a convener or as an umpire, and if so, whether this should be the *Maire* or a judge, particularly *a Juge de Paix.*

Nearly all proposals refer to the experiences with conciliation and arbitration in other countries, particularly in the United States and in Great Britain. The names of Mundella and Kettle frequently recur in the documents concerned.

Were there any private initiatives taken in France itself? There had been such initiatives and some were quite successful. The *Conseil syndical mixte de la papeterie,* set up in 1874 for the paper and stationary trade by a progressive *patron,* monsieur Vavasseur, still prospered in the early 1890s.[37] It consisted of equal numbers of representatives of the employers and the workers (eight on each side), who chose their own chairman, and met at least four times a year to discuss all important issues concerning terms and conditions of employment.

Similar private initiatives had been taken in 1877 in Rouen by typographers and in Paris by employers and workers in the laundries. Yet the legislative proposals made did not go in the same direction as the Conciliation Bill which was discussed across the Channel two or three years later. All proposals had in common that they regarded the involvement of an authority, trusted and respected by both parties essential, regardless of whether a habit of working together between employers and workers had already developed or not.

A governmental commission decided on the basis of the proposals made that a system of voluntary reference should be opted for, producing results which would be binding in law.[38] The governmental commission was uncertain whether to opt for a permanent institution or for *ad hoc* mechanisms. It advised Parliament to do both.

The matter was now taken over by a committee under the auspices of the Minister of Commerce and Industry, Monsieur Jules Roche, to prepare a Bill on the basis of the outcome of this discussion and on the basis of surveys conducted by the *Office du Travail,* the predecessor of the Department of Employment, targeting the *Conseils de Prud'hommes* and the *Chambres de Commerce.* The last mentioned surveys had

[36] C. de Fromont de Bouaille (1894), *La Conciliation et l'Arbitrage dans les Conflits entre Patrons et Ouvriers; Commentaire de la Goi du 27 Decembre 1892,* Paris, identified three initial proposals: those made by Raspail, Lockroy and Le Cour, o.c., 150 ff.

[37] C. de Fromont de Bouaille (1894), o.c., p. 137.

[38] Ibid., p. 163 ff.

addressed yet another option, namely whether the competence of the *Conseils de Prud'hommes* should be extended so as to include the conciliation and arbitration in collective labour disputes. This option was not so far-fetched. The *Conseils de Prud'hommes,* established as early as 1806, had served as an example for other countries to set up specialised conciliation and arbitration machinery for collective disputes - a fact proudly underscored in the final report by the *Office du Travail.*[39] This option was, however, repudiated both by the *Conseils de Prud'hommes* themselves as well as by the researchers of the *Office du Travail.*

The major obstacle identified was that the election system of the *Conseils de Prud'hommes* frequently resulted in the representation of branches within the *Conseils* other than those of the industry in which there were most disputes. This did not cause insurmountable problems as long as disputes involved the mere interpretation of existing contracts. This was the case with the *Conseils de Prud'hommes* so far, but it would become problematic if the *Conseils* had to conciliate and arbitrate in disputes over future terms and conditions of employment. This obviously required adequate expertise on the part of the conciliator or mediator.[40] The *Chambres de Commerce* argued that new legislation providing for arbitration was superfluous, since the *Code Civil* already provided the parties with an arbitration regulation.

The drafting committee working under the auspices of the Minister agreed with the *Office du Travail* to drop the option of extending the competence of the *Conseil de Prud'hommes.* It did bring about some changes and refinements in the recommendations of the commission which had synthesised the initial proposals earlier on. Thus the drafting committee suggested that the *Juge de Paix* should be involved rather than the *Maire* (Mayor) as the latter would be too much enmeshed in politics and therefore lack an appearance of impartiality. Also, contrary to the commission's recommendation, the drafting committee proposed to make the outcome of conciliation or arbitration not binding in law, as this would only lead to problems of enforcement, particularly on the workers. Another, more effective *sanction* was suggested, namely to make a refusal to comply with a conciliated settlement or arbitral award publicly known.[41] Here a role was still envisaged for the *Maire.*

The bigger part of the Bill was devoted to *ad hoc* procedures of conciliation and arbitration. Only four summary provisions for permanent conciliation and arbitration institutions were incorporated in the Bill. These provisions made no mention of how the members of such institutions should be selected.

While the Bill was on its way to Parliament, a „last minute" dissent was added by Monsieur Mesureur, one of the members of the committee.[42] He warned that involvement of the *Juge de Paix* would appear to be a most unlucky choice, as this *magistrat modeste* would not have sufficient authority or inspire sufficient confidence in the employers and the workers. It was better, according to Mesureur, to respect the desire of both sides of industry to deal with problems themselves. A third party

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[39] Office du Travail (1893), *De la Conciliation et de l'Arbitrage* dans l*es Conflits Collectifs entre Patrons et Ouvriers, en France et á l'Étranger,* Paris. See the preface by the director of the *Office du Travail,* Jules Lax.

[40] Office du Travail (1893), o.c., p. 9.

[41] The *Chambres de Commece* had strongly disapproved of this sanction in its reaction to the Govemment survey. De Fromont de Bouaille (1894), o.c., p. 146.

[42] De Fromont de Bouaille (1894), o.c., p. 169.

originating from within the branch of industry concerned was preferable. Mesureur suggested to follow the Belgian example of the *Conseils de l'industrie et du travail,* which had been established by law in 1887. For France, Mesureur proposed a system of *Conseils du Travail,* to be installed industry-wise. The primary task of each *Conseil du Travail* was to advise on all issues relating to the terms and conditions of employment and to negotiate collective agreements pertaining to its branch of industry, to take charge of conciliating and arbitrating disputes arising within its branch and to elect members for a similar agency, operating nation-wide, the *Conseil Supérieur du Travail.* According to Mesureur, the role reserved for the *Juge de* Paix in the Bill should be attributed to the president of the section within the *Conseil du Travail,* which organises the particular branch of industry in which the dispute arose.

In Parliament, the *Chambre des Députés* did not consider Mesureur's proposal. The Bill as suggested by the committee was adopted, except the provisions on permanent conciliation and arbitration institutions. The opinion in the *Chambre* was not hostile towards permanent institutions, but it was held wiser to first conduct some in-depth studies into the proper way of organising such institutions. The *Sénat* passed the Bill without amendments of any significance.

2.2. The system of the Act of 27-12-1892

Under the guidance of Mr Jules Roche, Minister of Trade and Industry, the Bill was thus enacted in 1892. This Act on Conciliation and Arbitration in collective disputes, as it was designated, provided for both a conciliation and an arbitration procedure in collective disputes, between employers and wage-earners as well as salaried employees.

Conciliation was to be performed by conciliation committees, set up with the consent of the parties on *an ad hoc* basis. Such committees consisted of representatives of the parties, who met under the chairmanship of *a Juge de Paix.* The *Juge de Paix* directed the discussions of the conciliation committee, but only in an advisory capacity. Yet he/she was more than just a panel chairman, as the law had attributed an interesting role to him/her in initiating the procedure.

The normal course of action envisaged by the Act was that either of the parties could set the procedure in motion by submitting a written report to the *Juge de Paix* in the *canton* (court district) in which the dispute had arisen. In this report, the alleged cause and subject matter of the dispute had to be set forth. The applicants had to give their own names and occupations, as well as those of their opponents. Finally, applicants had to indicate the names and occupations of the representatives they had chosen to retain in the dispute.

Within twenty four hours after receipt of the report, the *Juge de Paix* had to notify the other party. Within three days, that other party would have to respond whether he/she agreed to an attempt at conciliation by the committee. If he/she refused, the conciliation would be cancelled. Failure to respond within three days was also regarded as a refusal. In this sense, the procedure was entirely voluntary. However, according to the Act, a refusal to take part in a conciliation procedure would have to be communicated by the *Juge de Paix* to the *Maire* of every municipality to which the dispute extended. The *Maire* would have to make the refusal public. As a matter of fact, even the original application for conciliation would have to be communicated to,

and publicly announced by the *Maire*. This aspect of the procedure seems to hide an element of compulsion, or at least moral pressure.

Next to the procedure initiated by the parties themselves, another procedure was envisaged in the Act in disputes where a strike had been called already. In such cases, the *Juge de Paix* could invite the parties ex *officio* to submit their differences to a conciliation procedure.[43] However, in this situation again parties would be allowed to refuse co-operation, but again such a refusal would be publicly announced.

A great amount of freedom existed as to the appointment of representatives. The representatives could be chosen from amongst the parties actually involved in the dispute, for instance a delegation of workers in the factory concerned. It was also possible for employers and employees to appoint an expert from their respective professional associations as their representative. The only two legal restrictions concerned the maximum number of representatives, being five for each party, and their nationality, which had to be French.

If both parties agreed to conciliation, the *Juge de Paix* officially convened the members proposed for the committee. Any decision reached by the committee had to be adopted unanimously. The *Juge de Paix* would then draft a report of the meeting, including the agreement reached, if any. If an agreement was reached, the report was signed by the parties. The legal status of such an agreement was that of a collective contract, effective as between the parties involved.[44] Just as the originating application and a refusal, a conciliated agreement would be communicated to the *Maire* and publicly announced by him.

The Act of 1892 also provided for arbitration, but only as a derivative of the conciliation procedure. If agreement could not be reached before the conciliation committee, the *Juge de Paix* had to invite the parties to participate in an arbitration procedure. In that case, the parties would have to appoint representatives to function as arbitrators in an arbitration committee. A difference between the appointment procedure for arbitrators as compared to conciliators was that parties could decide to nominate one or several arbitrators each, or one single arbitrator jointly.[45]

There were further procedural differences between conciliation and arbitration. Parties had to define the questions they submitted to an arbitration board in detail and the arbitration board was obliged to give an arbitral award.

In case more than one arbitrator had been nominated, and the arbitrators failed to agree on a settlement or arbitral award amongst themselves, an umpire with a casting vote could eventually be nominated by the president of the *Tribunal civil de premiére instance* (Court of first instance).

The arbitral award was signed by the arbitrators and handed over to the *Juge de Paix*, and sent to the *Maire* for publication. If parties had decided to regard themselves bound by the award, then the award had the force of a collective agreement.

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[43] S. 10 of the Act. Journal Officiel de la Républiqué Francaise, 1892, No. 352, p. 6276.

[44] As the first statutory framework for collective agreements was brought about in 1919, one may wonder whether between 1892 and 1919 there were parties questioning the precise legal effect of such conciliated settlement agnrements. No information is available to the authors on this point.

[45] The 1933 ILO study on conciliation and arbitration erroneously suggests that women were not eligible as arbitrators. S. 15 of the 1892 Act explicitly caters for the appointment of female arbitrators. International Labour Office (1933), *Conciliation and arbitration in industrial disputes, studies and reports*, Geneva, p. 176.

3. The World War I Period: Compulsory arbitration

By virtue of the Decrees of 17 January and 7 September 1917, permanent conciliation and arbitration committees were set up in those branches which formed a part of the war industry.[46] Reference of disputes to these committees was compulsory. A dispute would first be dealt with by a conciliation committee, to be convened by Government officials, the *controleurs de la main d'oeuvre.* Should conciliation fail, then the case was automatically referred to an arbitration committee, also convened by the *controleurs de la main d'oeuvre.* The arbitral award was legally binding, and penalties were introduced to guarantee the smooth operation of these committees as well as prompt enforcement of their decisions.[47] Just as in Great Britain, the rationale underlying this was the necessity to adopt vigorous measures in order to prevent stoppages of work in this essential branch of industry.

4. The Dissatisfaction with the 1892 Act: Alternatives between 1900 and 1936

Dissatisfaction with the 1892 Act arose once it became clear that the vast majority of strikes never reached the conciliation committee's negotiation table. It has been calculated that between 1892 and 1936, some 30 bills were introduced, each of them trying to solve the perceived deficiencies of the 1892 Act.[48] Already before World War I, in the year 1900, a bill had been proposed by Millerand and Waldeck-Rousseau seeking the establishment of permanent works councils in industrial enterprises employing more than fifty employees. The primary function of these councils, consisting of staff representatives, was to act as a conciliation committee. In order to be able to prevent labour disputes, the councils were to meet regularly with the board of directors. Should the preventive conciliation of the works council fail, then the employer and the workers should each appoint arbitrators. The referral to arbitration had a strong compulsory element, since the Bill stipulated that a refusal by the employer to co-operate would confer upon the workers the right to call a strike by majority vote. By implication, the strikers would be indemnified against claims under private law.

The Bill was rejected in 1900. Further bills which introduced different versions of this system were also rejected in 1902, 1906, 1910 and 1917. One point of criticism concerned the confinement of the works council's competence to disputes arising within one single enterprise, thus making the system ill suited for disputes transcending one enterprise or extending to a whole branch of industry.

In 1920 another bill was introduced which replaced the permanent works council conciliators *by ad hoc* delegates from the workers, who were to make a first effort at conciliation. If a dispute was unavoidable, a conciliation committee would be set up through an administrative regulation. A strike could not be called lawfully, until such an attempt at conciliation had been made. The Bill was never passed.

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[46] J. Edelstein (1922), *La Conciliation dans les Con~lits Collectifs,* Paris, p. 80 ff.
[47] J. Edelstein (1922), o.c., p. 81.
[48] J. Colton (1951), o.c., p. 6.

One year later, an amended version of the Bill was proposed. In this version the workers' representatives had become permanent again. In case a dispute could not be averted, newly created district trade committees were to conciliate and to arbitrate if necessary. Reference was made compulsory and even penalties were provided. This Bill was not passed either.

Yet another bill was introduced in 1929. A compulsory conciliation procedure, to be utilised prior to a strike was proposed together with a voluntary conciliation procedure for those instances where a strike had already been declared.

During the first, compulsory, attempt at conciliation the right to strike would be suspended. For the second, voluntary procedure, a Superior Conciliation Committee attached to the Ministry of Labour was envisaged. Failing a choice of conciliators by the parties themselves, the Minister of Labour would be allowed to instruct the parties to appear before this Committee, consisting of equal numbers of employers and workers recruited by the Minister from members of the Economic Council. This Bill was not enacted either.

Summarising, the conclusion seems justified that French politicians in the era described were rather desperately seeking techniques to prevent collective disputes from escalating. In this process the draftsmen experimented with various combinations of compulsion and voluntariness. Voluntary procedures were perceived as ineffective - lacking a genuine willingness on the part of employers and to a lesser extent the unions to utilise these - whereas compulsory procedures were consistently turned down by the employers and their spokesmen in the political arena.[49]

5. The compulsory arbitration system of the front populaire: 1936-1939

The Act of 31-12-1936 and the amending Act of 4-3-1938 provided for a complete new system of settlement procedures. The most important features of the new system were the more important role reserved for unions - the *Front Populaire* united the radical political parties and the trade unions - and the compulsory character of the conciliation as well as the arbitration procedure.

This compulsory arbitration was unique in Europe, in that it was operated in peace time.

The background to the system lay in the high rates of inflation, following the great Depression. The unions insisted on the introduction of sliding wage scales to secure their members' purchasing power. Strikes and occupations of factories were organised to press for this demand. Prime Minister Léon Blum could not manoeuvre a bill introducing such a system, through the *Sénat*. The *Sénat* was only willing to agree to a compulsory arbitration system, a second option held by the Government, as a means to control inflation and wages development and safeguard industrial peace. Rather than legislating for compulsory arbitration, Blum preferred the introduction of such a system on the basis of an agreement between the two sides of industry. During a second meeting at the Hotel Matignon, however, the employers stubbornly resisted the

[49] ILO (1933), o.c., p. 184.

introduction of such a scheme.[50] Blum saw no other way but to legislate for a compulsory system. In Parliament, the system was described as a means of „reconciling the interests of the parties with the higher interests of the nation".[51]

The Act of 31-12-1936 provided for a reference system, which on closer analysis could be characterised as quasi-compulsory. Reference of a collective dispute to the statutory system of conciliation and arbitration was only prescribed for those situations where no conventional conciliation or arbitration procedure was agreed between employers and unions.

It should be observed here, that by 1936 only 7,5% of all wage earners were covered by collective agreements.[52] Reference to the statutory system was to be made before a strike had been called. The unions interpreted this clause not as an intrusion on their freedom to strike, but rather as a procedural rule, turning strikes to weapons of last resort.

Several hierarchical layers of conciliation machinery were provided, with every higher level becoming involved where the lower level had failed. These committees were to be staffed by representatives of the employers and the workers, the first category being shortlisted by the *Chambres de Commerce,* the second category by the *CGT.* If conciliation failed at even the highest level, the responsible committee would draw up a list of remaining issues of disagreement. On the basis of this list, the dispute had to be referred to the arbitration procedure. The parties were to appoint a number of arbitrators each, and an umpire as well. Should they fail to do so, then the Government would step in to make the appointments itself. The arbitrators were allowed by the law to decide the disputes submitted before them as *amiables compositeurs,* meaning they would not be bound by the strict rules of law in considering the claims before them. The arbitral award rendered was not binding in law and no penalties were provided for failure to obey.

The Act was meant to remain operative only temporarily, and as the : social-economic situation was not going to improve, a further Act had to be introduced to extend the system. At this occasion some improvements were introduced. It was felt as a shortcoming that the original Act did not discriminate between collective disputes involving the interpretation of existing norms and disputes over the negotiation of future norms. It was found that many inconsistent and arbitrary decisions had been handed down by the arbitrators, who were not bound by the law in any way. Thus in the Act of 1938 a distinction was introduced, for the first time in France, between collective disputes over interests and collective disputes over rights. Only in the first category were arbitrators allowed to decide as *amiables compositeurs.*

Another shortcoming of the Act, namely the lack of further specifications of what constituted a collective dispute, was not remedied, as it appeared impossible to reach agreement on a proper defáition.

The compulsory arbitration system has been described as an expedient, adopted to meet continued labour unrest. It was certainly not a planned experiment.[53]

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[50] O. Dulias (1938), *l'Arbitrage obligatoire dans les Conflits Collectifs du Travail,* Paris, p. 25.
[51] J. Colton (1951), o.c., p. 44.
[52] J. Colton (1951), o.c., p. 9.
[53] Ibid., p. 70.

It has been observed that conciliation was practised as a matter of habit, whilst the fear of compulsory arbitration encouraged the parties to seek agreement through conciliation.[54]

6. The World War II Period: Corporatism and compulsion

World War II brought an interruption in the development just started. All legislation concerning collective agreements and collective labour disputes was suspended by a Decree of 1-9-1939.

In Vichy-France a corporatist system was introduced, in which strikes were prohibited altogether and disputes had to be referred compulsorily to corporatist agencies for an imposed decision.

7. The Act of 11-2-1950: Quasi-voluntary conciliation

A few years after the war, some elements of the labour dispute settlement system of the *Front Populaire* were reintroduced through the Act of 112-1950, which set up a system of national, regional and departmental conciliation committees.

7.1. The conciliation system of the Act of 11-2-1950

The same Act of 11-2-1950 laid down a new legal framework for collective agreements. Both aspects of this law were unmistakably intertwined. The Act referred specifically to direct negotiations as the first method to settle disputes. In order to stimulate the use of conventional settlement procedures, the adoption of such a dispute settlement clause was made a preliminary requirement for a collective agreement to be declared applicable *erga* omnes.[55]

Moreover, the statutory conciliation procedure elaborated in the Act was explicitly designed as a complement to conventional procedures. The statutory procedure had to be used a) if a conventional procedure was not available, or b) if for any reason an existing conventional procedure had not been used.[56]

Hence recourse to the statutory procedure was made compulsory. The Act stipulated that collective disputes had to be submitted to a conciliation committee without delay, or at least „within one month. The Act did not indicate how the one month period had to be determined, nor did it provide sanctions in case of non-compliance. As a result, it is unrealistic to label this statutory conciliation procedure as compulsory.[57]

An amending Act of 26 July 1957, however, provided an element of compulsion, in that parties were obliged to notify the *Préfet* of the Department concerned that a dispute existed. This enabled the *Préfet* to attempt informal preconciliation. Were this

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[54] X. Blanc-Jouvan (1971), o.c., p. 47.

[55] This construction is diametrically opposed to Dutch law, where it is provided that settlement clauses can never be applicable *erga omnes*.

[56] S.7 of the Act of l 1-2-1950.

[57] The word "unrealistic" is used by X. Blanc-Jouvan (1971), o.c., p. 49.

to be unsuccessful, then the *Préfet,* or the *Inspecteur du Travail,* could refer the dispute to a conciliation committee. The parties also retained the right to submit their dispute to the commission.

The conciliation committees envisaged by the 1950 Act were tri-partite. Employers and employees would have to appoint three representatives each, as members of the commission. A Government official would chair the commission. The chairman of the national commission would be the Minister of Labour or his representative. The regional commissions would be chaired by the regional *Inspecteur du Travail,* the labour inspector. Each chairman could be assisted by representatives from other Government agencies, as long as their number would not be more than three.

The size of a dispute would normally be decisive for determining the competence of either the national, regional or departmental commissions. Appeal procedures were not provided.

7.2. The Arbitration system of the Act of 11-2-1950

Under the same Act of 1950, a voluntary arbitration procedure was established, before a Central Court of Arbitration. Here, disputes could be submitted which had not been resolved successfully through either the statutory or the conventional conciliation procedure. This procedure has actually had no practical relevance.[58]

8. The complementary mediation system of the Decree of 5-5-1955

Between 1951 and 1955 several bills were introduced seeking the establishment of mediation machinery alongside the conciliation procedure provided by the 1950 Act. The drafters of these bills were positively impressed by the American experience with federal and state mediation agencies.[59] The system that was finally adopted contained both voluntary and compulsory elements. The hallmark of the system was the early intervention of central Government authorities. Should conciliation fail, then either of the parties could refer a dispute again to one of the conciliation committees established under the 1950 Act, and ask for mediation. Such a committee was allowed to mediate, even if only one of the parties had demonstrated a genuine interest. Even without the consent of both parties, a mediation procedure could be initiated by the Minister of Labour or an official of the labour administration, depending on the level where a dispute had arisen. The parties could object to the procedure only if they demonstrated that an arbitration clause applied between them, whether these had been agreed before or after the dispute arose.

The mediator was given powers of investigation: he/she could summon the parties to appear in person and hear witnesses. Refusal of witnesses to appear was subject to fines. A similar sanction awaited the party who did not comply with a request to provide particular documentary evidence. Eventually, the mediator would propose a solution. If it appeared that the proposals made were not acceptable to the parties, the

[58] T. Treu, (1984), o.c., p. 132.
[59] X. Blanc-Jouvan (1971), o.c., p. 55.

mediator should make a final recommendation. The contents of such a recommendation varied, depending on whether the dispute related to rights or interests. In disputes over interests, the recommendation consisted of the proposed solution. In disputes over rights, the mediator should confine himself in his recommendation to advising the parties to take their dispute to the court or to an arbitrator.

The mediator's recommendations were not binding upon the parties. The underlying idea of the procedure was exactly this, according to Blanc-Jouvan: "merely to propose a solution, not to impose one". In this sense mediation was halfway-house between conciliation and arbitration. This applied to the method of referring disputes to mediation as well. Here, the conciliation system under the 1950 Act comprised more elements of coercion than mediation, whereas arbitration comprised less of such elements, although the arbitral awards were binding upon the parties.

The mediation system was reasonably popular during the first few years after its establishment. During the second half of 1955, 34 disputes were referred to the mediation system, a majority of 20 by the employers, and 3 by the governmental authorities on their own initiative. However, figures had begun to decline already in 1957. During the 1960s and 1970s the mediation system was hardly used and its practical significance today is `virtually nil'.[60]

9. The Act of 13-11-1982

The failure of both the conciliation system of 1950 and the mediation system of 1955 induced the Government to enact some amendments to the 1950 and 1955 Acts. These amendments, incorporated in the Act of 13-11-1982, mainly concerned the scope of conciliation and mediation procedures which was broadened so as to include the whole of the private sector as well as state-owned commercial enterprises. Reference to both procedures was made entirely voluntary. Despite these amendments, the procedures do not seem to have become more popular recently.

10. The Councils of Prudent Men

The *Conseils dé Prud'hommes* (Councils of Prudent Men) have lived nearly two centuries of changing industrial relations. Many of these changes were reflected in the competence and composition of the *Conseils* and the methods of dispute settlement used. The development of this remarkable institution is discussed from its establishment in 1806 through to the present.

10.1. The establishment and historical development of the Councils of Prudent Men

The origin of the *Conseils de Prud'hommes* dates back to the era of the *Ancien Régime*. Committees, composed of masters and workmen, were already known to

[60] T. Treu (1984), o.c., p. 129.

exercise jurisdiction over labour disputes arising within the silk trade in 18th century Lyon.[61]

The French Revolution and the subsequent Constitution of 1791 abolished this system of dispute settlement, together with all other special agencies, procedures and regulations emanating from within the guilds and trades. The administration of justice was shifted from these „intermediate structures" to a new, nation-wide machinery of elected judges. During the following years, manufacturers and workers lived in a legislative vacuum. Abuse and disorder soon became manifest, to the detriment of manufacturers and workmen alike, and by the end of the year 1802, legislation was passed introducing Chambers of Commerce as well as *Chambres consultatives de manufactures, fabriques et métiers,* chambers set up for the purpose of collecting the advice of manufacturers and traders on the issue of how commerce could best be promoted. The statutory instruments introducing these Chambers also set up a special jurisdiction under which all disciplinary matters relating to workmen were to be referred to the prefect of police in Paris or to the *Maire* in the provinces.

The inconvenience of this procedure was pointed out to the Emperor Napoleon during a visit he made to Lyon in 1806 by the silk weavers of that place. The weavers suggested to him the re-establishment of an institution analogous to the one they had possessed prior to 1791. Napoleon showed sympathy for this idea and an Act re-establishing the said institution under the name of *Conseil de Prud' hommes,* was promulgated on 18 March 1806.

In his explanatory memorandum to the legislature, councillor of state Regnault-de-St. Jean-d'Angely, who had also introduced the legislation on the Chambers of Commerce, stressed the need of vigilance in the area of manufacture and commerce in order to prevent disorder and abuse. Such ongoing vigilance required a type of knowledge which could only be expected among persons who were themselves engaged in the manufacture concerned. Such a manufacture-based system would also be more effective than the austere judiciary in securing the willing submission of workmen and masters: it would have paternal charisma.[62]

An Imperial Decree of 11-6-1809 supplementing the 1806 Act stipulated that similar *Conseils* could be set up at any time in those parts of the country, where the Government would hold this to be desirable because of industrial and commercial activity.

This provision, however, was not used to create a nation-wide system of *Conseils* at once. On the contrary, the creation of additional *Conseils* took place sporadically whenever a particular need arose in a given area, and only gradually their number grew.[63]

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[61] The history of the *Conseils de Prud'hommes,* or at least the institution it stands for, goes back further in history.

[62] Sir Henry Halford, *Memorandum on the* Conseils *de Prud'hommes in France,* Appendix No. 9 to the Report from the Select Committee on Masters and Operatives, Parliamentary Reports, House of Commons, 1856, p. 286 ff.

[63] As indicated *supra,* the *Conseils de Prud'hommes* gradually supplanted the *Juges de* Paix in the area of labour disputes. Each *Conseil* was attributed an area of geographical competence. As the number of *Conseils* only increased gradually, this meant that in (arge parts of the country there was no Conseif to resort to. In those areas, the *Juge de Paix* would normally be competent to hear the case. Also those categories of labour disputes which were not explicitly brought under the jurisdiction of the *Conseils* were handled by the *Juge de Paix,* or

During the 187 years of its existence, the *Conseil de Prud'hommes* has been subjected to a number of changes, as to structure, composition, jurisdiction and procedure. The efficacy of the *Conseil* and its relative part in the overall handling of labour disputes has changed accordingly. The major changes are now dealt with briefly.

10.2. The present statutory basis of the Councils of Prudent Men

The Act of 18-1-1979 constitutes the present statutory basis of the *Conseil de Prud'hommes,* together with an amending Act of 6-5-1982. Both Acts were implemented through a number of changes in the *Code du Travail.*

The issues addressed by the 1979 Act concerned the jurisdiction of the *Con*seils, as well as the election, training and protection of the *conseillers.* The *Conseils* in the Alsace - Moselle region were initially left unaffected by this Act, but the 1982 Act abolished these tri-partite institutions, and replaced these by *Conseils* similar to those in the rest of France. The 1982

Act, moreover, re-amended the system of elections, and established a *Conseil Supérieur de la Prud'homme,* a consultative agency with the *Garde des Sceaux,* charged with carrying out surveys amongst the *Conseils* and making recommendations on how to improve their functioning.

On the issue of jurisdiction, s. L 511-1 of the *Code du Travail* now provides that the *Conseils de Prud'hommes* decide the disputes which may arise from any individual employment contract or contract of apprenticeship.

As to these disputes, the *Conseils* decide in the first and final instance if the amount in controversy does not exceed 12,000 Francs. For claims exceeding this amount, appeal against the decision of the *Conseils* lies with the Social Chambers within the Courts of Appeal and with the *Cour de* Cassation, provided that the requirements for an appeal in *cassation* are satisfied.[64] The jurisdiction of the *Conseils* is regarded as concerning public order and public policy. Therefore, employers and employees are prohibited from contracting out of the *Conseil's* jurisdiction, for instance by substituting a joint conciliation committee set up under a collective agreement for the *Conseil de Prud'hommes.* As is demonstrated in the next Chapter, such a public policy argument does not exist in Belgium, where individual employment disputes are regularly dealt with by such Joint Committees.

In their *jurisprudence* the courts of appeal have given a broad interpretation to the jurisdiction of the *Conseils.* It is understood as encompassing all aspects relating to the conclusion, interpretation, discharge and termination of all employment contracts, thus turning the *Conseils* into the preeminent Courts of labour law.[65]

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occasionally by designated specialised agencies. We decided to leave the *Juge de Paix* out of our analysis, as this instance forms part of the regular court structure. This is despite the conciliation task of the *Juge de Paix.* See C.M.G. ten Raa (1970), o.c.

[64] This requirement is that there must have been a violation of the law, S. 604, *Nouveau Code de Procédure* Civile. In the leading commentaries on French law, violation of the law is distinguished into (*i*) misapplication of substantive law rules, (*ii*) failure to observe procedural requirements, (*iii*) lack of jurisdiction, (*iv*) misuse of jurisdiction and (*v*) inconsisteney of judgments in similar cases.

[65] J. Villebrun (1987), *Traité de fa jurisdiction prud'homale,* Paris, p. 465, regards the Conseils as the "juge de droit commun en droit du travail".

An equally extensive interpretation has been given to the concept of „individual". The *Cour de Cassation* has decided that a dispute is to be regarded as `individual' if its purpose is the enforcement of a right that an individual employee can derive from the law, no matter whether that law has a statutory or a collective, conventional basis. Neither does it matter whether the action is brought by an individual employee, by a group of employees, or by a trade union acting on behalf of the employees.[66] Even an action brought for payment of fringe benefits, which actually concerned all personnel in an enterprise and necessitated the interpretation of a collective agreement, has fairly recently been regarded as having an `individual' character.[67] It should be observed, however, that trade unions can be encountered frequently before the *Conseils de Prud'hommes* in either of two roles: to assist the individuals who may bring actions, but also to act as parties in their own right. Trade unions are granted *a locus standi in judicio* of their own, notably in disputes which are founded on collective agreements, in disputes over equal pay, equal treatment and non-discrimination, and on disputes arising over temporary work. The individual employee(s) whose rights have been allegedly infringed must have agreed to the unions taking over their right to proceed in court.

As to territorial competence, the 1979 Act provides that there should be at least one *Conseil* in the *resort* (jurisdictional area) of each *Tribunal de grande instance* throughout the country - thus eliminating the jurisdictional blind spots which there were thus far. Detailed rules provide for a further consistent delineation of territorial competence.

10.3. The organisation of the Councils of Prudent Men

The 1979 Act stipulates that every *Conseil* is to be divided into five sections, notably commerce, industry, agriculture, *encadrement* (managerial and professional staff) and miscellaneous activities. Each section has to be staffed with at least eight *conseillers,* four on behalf of the employers and an equal number on behalf of the employees. A section comprising of more than sixteen *conseillers* may set up *chambres* (panels) as a practical device for distributing caseloads and facilitating Internal communication. Each section, or each panel if any, must maintain at least one *bureau de conciliation* and one *bureau de jugement.* The *bureau de conciliation* is staffed by two *conseillers,* one for the employers and one for the employees, who alternately act as chairperson. The *bureau de jugement* must be staffed by at least four *conseillers,* with equal numbers from both sides of industry. Should the votes be equally divided on any particular case, then a further meeting, presided by a judge from the *Tribunal d'Instance* is required by law.

The law, moreover, requires a system of rotation, enabling each *conseiller* to sit in *a bureau de conciliation* at one time, and in a *bureau de jugement* at another time.[68]

Within each *Conseil,* the *Assemblée générale,* of which all *conseillers* are members, is the most important organ for internal decision-making.

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[66] Soc., 10 mars 1965: *Bull.civ.* IV, No. 214.

[67] Decision of the Social Chamber of 28-11-1984, *Cahiers prud'homales,* No. 1, 1986, jurispr. p. 1.

[68] For the maximum time set for *conseillers* to spend working in *a Conseil,* see below at recruitment and training.

One of its tasks is to appoint one *juge de référé,* a single *conseiller* supervising hearings for the exclusive purpose of granting provisional relief. This procedure, introduced through the Act of 12-9-1974 as a device for dividing the work within *the Conseils* more efficiently and to make up the increasingly frequent backlogs, is obviously in flagrant contradiction to the principle of equitable decision making. The law provides that in appointing these *juges de référé,* care should be taken that *conseillers* from both sides of industry take turns, every other year, in holding this office.

The 1979 Act also replaced the system of local secretariats and introduced *a sécrétariat-greffe* (secretariat-clerk's office or registry), financed by the central Government.[69] This secretariat is integrated in the registries of the regular courts. The *greffiers* (registrars or clarks) play an important role as technical consultants for the *conseillers* and even for the parties, as was demonstrated by a survey to be discussed below. Their task includes the convocation of the parties, the drafting of the minutes during sessions held before the *bureau de conciliation* or the *bureau de* jugement, generally the responsibility to keep the file of every case up to date and to prepare the standard forms in which the judgements are incorporated.

10.4. The conciliation task

All disputes submitted to the Conseils *de Prud'hommes* are first referred to the *bureau de conciliation.* The reference to this bureau for an attempt at conciliation is compulsory. The *Cour de Cassation* has confirmed that the conciliation procedure is one of public order and thenceforth it cannot be bypassed, except in situations explicitly laid down by the law. The Supreme Court also specified that the duty to participate in an attempt at conciliation is real and is not a mere formality.[70]

The compulsory character of this conciliation procedure is frequently justified by reference to the idea that originally underlied the institution of the *Conseils de Prud'hommes:* to act as a conciliator, rather than a court.[71] This mission is epitomised by the official symbol of the *Conseils:* two shaking hands, and not the Sword of Justice.

The procedural rules applicable to the *préliminaire de conciliation* reinforce this idea, at least to some extent. The parties are under a duty to appear in person, a duty referred to as *comparition* in French. This duty extends to the procedure before the *bureau de jugement* also. Parties can, however, be represented, but under two proviso's. First, they must demonstrate *a motif légitime* for not appearing in person. Second, the

[69] A survey conducted in 1974 by the Commission *Exécutive des Conseils de Prud'hommes* had indicated that 27% of all 250 or so *Conseils* in France did not have a secretariat at all. In addition, 44% of all *Conseils* only had one conference room available which had to be used for the sessions of the *bureau de conciliation* as well as the *bureau de jugement.*P. Cam (1981), o.c., p. 11.

[70] Soc., 7 mars 1957, *Bull. civ.* IV, No. 271.

[71] Although conciliation is given pride of place in the *Nouveau Code de Procedure* Civile, conciliation having a compulsory character is exceptional in modern French law. Not so, however, in the past: the revolutionary Act of 16-24 August 1790, establishing a new court system, provided that all Tribuneaux *de* district were under a duty to attempt at conciliating the parties. Also see C.M.G. ten Raa.

person representing the party must belong to one of the categories enumerated in the exhaustive list of s. R 516-4 of the *Code du travail.*[72]

The law stipulates that conciliation sessions should be held at least once a week. These sessions are held *in camera.* During such a session, to which the parties are normally summoned through a registered letter, both parties are asked to provide their interpretation of the dispute and their proposals for a solution to the *conseillers.* The *principe du contradictoire,* one of the principles of natural justice in France, dictates that the parties are heard in each other's presence. These joint meetings are concluded by the *conseillers* proposing their solution to the dispute, which may but does not necessarily have to be based on the proposals advanced by the parties. The parties are free to accept or to refuse these proposals for an amicable settlement. In case of refusal, the case is down for a hearing before the *bureau de jugement.* Hence, at this point the conciliation procedure takes a voluntary character.

The legal status of an amicable settlement, concluded before the *Conseils de Prud'hommes* is that of a contract, authenticated through the signatures of both parties underneath the minutes drafted of the settlement agreement by the registrar. The contract thenceforth is conclusive evidence as between the parties and, if necessary, it provides a valid title for enforcement against a defaulting party. The *Conseils* lack jurisdiction in enforcement procedures; a party seeking enforcement of the settlement agreement would have to resort to the *Tribunal de Grande Instance.*

Minutes are also drafted of unsuccessful conciliations. This *procés-verbal de non-conciliation* is added to the file of the case and passed on to the *bureau de jugement.*

Having assessed that the conciliation procedure is partly compulsory and partly voluntary, it may be interesting to find out to what extent parties are under real compulsion to attend the actual conciliation sessions. In other words: are there any sanctions, which can be imposed on parties defying the duty to appear in person? The law distinguishes between the non-appearance of the plaintiff and that of the defendant respectively. If the plaintiff does not appear in person for a valid reason, his application is regarded as void. If there is a valid reason, however, for his absence, then the hearing is adjourned and postponed, usually for a few weeks.

If the defendant does not appear personally for a valid reason, the hearing will be again postponed. If there is no valid reason in the opinion of the *conseillers,* then the case is passed on to the *bureau de jugement* for adjudication. This last `sanction' may, however, be quite attractive in a number of instances ...

The *Cour de Cassation* has given a fairly liberal interpretation to what constitutes a valid reason for not appearing personally. For instance, the aversion of a freshly appointed employee to take a day off for attending a conciliation session was held to be a valid motive.[73]

By not appearing, the defendant thus has an opportunity to frustrate the entire conciliation procedure effectively. There are other methods of bypassing the conciliation phase, notably some exceptions to the compulsory reference which are laid down in the law. The most important situations which render conciliation inoperative are the submission of a dispute to a *juge de référé,* the submission of counterclaims

[72] The categories enlisted are colleagues employed at the same plant, trade union officials, *avocats* and spouses.

[73] Soc., 7 juillet 1965, *Bull. civ.* IV, No. 566.

sufficiently related to the original claim, and salary claims arising from the bankruptcy of the employer.

It should be recalled that the Act of 1974 authorised not only the *bureau dé jugement* but also the *bureau de conciliation* to take a number of measures necessary for the preservation of evidence, such as levying provisional attachment, and conducting a number of proof proceedings, including the possibility of appointing *a conseiller rapporteur.*

It has been observed that these powers, which are more of a judicial character, have come to be the major justification for the continued existence for the *bureau de conciliation* today. By using these powers efficiently, the *bureau de conciliation* can prepare the case for swift adjudication by the *bureau de jugement.* The issues that require no further delay and issues which require further evidence are taken out at this early stage. The French denote this process as *trancher,* cutting the dispute in separate slices, which are more easy to handle.

The *bureau de conciliation* has thus become regarded as the assistant to the *bureau de jugement,* rather than the most essential agency within the *Conseil de Prud'hommes.* What is the reason for this? Unlike in the past, conciliation today is only accepted by parties in a small minority of cases. Supiot has observed a marked decline in the role of conciliation in settling disputes, in favour of adjudication. During the 1830s, 93% of all disputes submitted to the Conseils were conciliated. In the early 1980s the percentage of conciliated cases had gone down to only 10%.[74]

10.5. The adjudication task

The procedure before the *bureau de jugement* has an adversarial and oral character. Orality is the guiding procedural principle for most special jurisdictions in France, but not for the procedure before the regular courts. The oral character of the procedure before the *bureau de jugement* does not exclude the possibility of handing in written documents, incorporating pleadings or documentary evidence. This possibility is in fact frequently used where parties are represented by professional lawyers.

The *bureau de jugement* has all the powers of the *bureau de conciliation* as to the conduct of proof proceedings, according the possibility to appoint *a conseiller rapporteur.* Its sessions are open to the public.

10.6. The recruitment and training of the councillors

The 1979 Act has retained elections as the mode of recruiting the con*seillers.* The term of service was initially set at six years, but the 1982 amending Act has reduced this term to five years. Detailed rules are provided for the professional arrangement of these elections. The electorate is classified into segments corresponding to the distinct sections within the *Conseils.*[75] The rules on eligibility are flexible. Every person of French nationality over 21 years is eligible, provided he or she is properly enlisted for the elections.

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[74] A. Supiot (1985), Déclin de la conciliation prud'homale, in *Droit Social,* No. 3, p. 225 ff.

[75] S. L 513-1, *ss.* 2 and 3 of the *Code du Travail.*

A commission *de recensement* (a supervisory committee) supervised by a judge, distributes the seats on the *Conseils*, taking account of the distinct sections, constituencies and shortlists provided.

In a critical appraisal, Estoup concluded that the sole requirement of being aged 21 or over constitutes a danger for the preservation of quality. This danger is particularly real as no diploma's or other qualifications are required, whereas the rapid growth of adversarial proceedings before the bureau *de jugement* and the need to state the (legal) grounds of the judgement properly call for at least some grounding in law on the part of the *conseillers*. In the era where conciliation played a more important role, this need was less obvious.

Estoup suggests that either of two solutions could be opted for to address this immanent problem. The *conseillers* could be relieved from their duty to state grounds for their judgements. This option, however, would be likely to result in arbitrariness, and is therefore rejected.[76] The better solution, according to Estoup, would be the adoption of a tri-partite system, such as existed until 1982 in the Alsace-Moselle region.

This last option has thus far met strong resistance by the trade unions as well as the employers. For the trade unions the bi-partite *Conseil* still marks a historic victory over the univers *juridique*. The employers particularly distrust a change to the tri-partite system. They held that increasing numbers of *juges rouges* (socialist judges) have come to staff the courts. Extension of the *Conseil* with magistrates of similar background would most likely distort the balance of power.

The underlying problem of lack of adequate qualification on the part of the *conseillers* is not easy to solve either. For the trade unions the requirement of diplomas is not open to discussion, as it would make the recruitment of *conseillers* from the ranks of the workers, notably blue-collar workers, considerably more difficult.

An initiative that met some success, however, is the short training programme that has been available since 1981 for unexperienced *conseillers*. The 1979 *Loi Boulin* made a provision for the first time that the training of *conseillers* would be the financial responsibility of the Governement. In 1980, a working party was established within the Ministry of Justice to design a training programme. An early outcome was the brochure *Vademecum du conseiller prud'homme*, which was, however, not widely distributed. The programme devised was meant to train neutral *conseillers*.

This strategy was strongly opposed by the trade unions. In 1981, when the election had brought the socialist party into Government, the responsibility for devising a training programme was shifted towards the Ministry of Labour. The unions were allowed to arrange a programme, particularly designed for the *conseillers* representing the workers. The 1979 Act does not compel the *conseillers* of either side to take part in this Governement financed training programme. Rather, participation is a right for the *conseillers*, although it is limited to a period of two weeks per year, for a maximum of three years.

The Act of 1979 also introduced statutory protection against dismissal for the *conseillers*.[77] The protection offered is similar to that extended to union representatives

[76] Being President of the Court of Appeal in Versailles, monsieur Estoup has carefully framed some guidelines for the *conseillers* on how to draft their judgments. Estoup (1991), o.c., p. 367 ff.

[77] See s. L. 514-2, *Code du Travail*.

in the enterprise. An employee who has to perform as *conseiller* may freely be absent from his job.[78]

These protective rights form an integral part of the *statute*, the rights and duties connected with the function of *conseiller*.[79] By virtue of the *statut*, the *conseiller* is also bound to a statutory code of conduct, which stipulates that the *conseiller* has a duty to render judgement, that he may not accept any mandates from third parties in the exercise of his function, that he can be challenged if he has an interest in the dispute pending before him, and that he may not act as a legal advisor to any party in proceedings elsewhere before the *Conseils de Prud'hommes*.[80]

10.7. The Funding of the Councils of Prudent Men

For disputants seizing the *Conseils* similar costs are involved as in proceedings before the regular or administrative courts in France. These costs mainly consist of registration fees.[81] The costs of staffing the *Conseils* are borne entirely by the Government. The *greffiers* are civil servants and therefore on the Government's payroll. The office of *conseiller* is honorary, but in order to enable *conseillers* to perform their function without financial prejudice, a complicated Government-financed system of allowances and reimbursements has been devised. For the time an employee is off work to perform as *a conseiller* the employer is fully reimbursed. Employers who perform as *conseillers* are reimbursed on the basis of different methods of calculation, depending on whether they are managers or sole proprietor of a small business.

The Presidents and Vice-presidents receive an additional hour-based remuneration for their work. This amount is tied to a maximum of 16 hours a month in the smaller *Conseils* to 72 hours a month in *Conseils* in major cities.

The *conseillers* frequently mention the presence of lawyers as a negative factor for conciliation. Obviously, lawyers do not always have a proxy to negotiate a settlement for their clients. Moreover, according to the survey, their training has made them less apt to accept compromises. Frequently lawyers appear only on the hearing before the *bureau de conciliation* asking whether a date has already been fixed for the hearing by the *bureau de jugement*. The impact of professional legal representation on the success of conciliation has also been investigated by Supiot. Of those cases, where employees appear in person, without any professional assistance, 34% is conciliated successfully. By contrast, of the cases where employees are assisted or represented by a professional lawyer, only 2% is conciliated.[82]

The personal relationship between the *conseillers* and *avocats* as the most important category of professional advisers was further explored in the survey of the *Conseil Supérieur*. On the whole, the *conseillers* regard the *avocats* with mixed

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[78] See s. L. 514-1, *Code du Travail*.

[79] Y. Desdevises (1987), Quelques remarques sur le statut du conseiller prud'homme, magistrat non professionnel, in *Droit Social*, No. 9/10, septembre-octobre 1987, p. 713 ff.

[80] See s. L. 518-1, L. 514-11 and L. 516-3 of the *Code du Travail*.

[81] Loi No. 77-1468 of 30 December 1977. The *bureau de jugement can award costs against the losing party*.

[82] A. Supiot (1987), *Droit du Travail, tome 9 (Les Juridictions du Travail)*, Paris, para. 537.

feelings. Although the *conseillers* acknowledge that interventions from lawyers contribute positively to the substance of the debate, the frequent requests for adjournments by avocats are strongly disapproved of. Moreover, the *conseillers* are annoyed at the disinclination of many *avocats* to hand in pleadings and other documents on time, and generally at their arrogant *esprit de corps.*[83]

According to the survey, 44 days on average elapse between the actual conciliation session and the day the report on the success or failure of conciliation was completed.[84]

[83] Conseil Supériur de la Purd'homie (1988), o.co, p. 49.

[84] This chapter based mainly on the work of Annie de Roo and Rob Jagtenberg: Settling Labour Disputes in Europe, Kluwer, 1994.

Chapter 4
Settlement of labour disputes in Germany

In Germany, which became a unitary state in 1871, the *Gewerbegerichte* (Trade and Industry Courts) were the first institutions responsible for settling labour disputes. These courts were established by the *Gewerbegerichtsgesetz* (Trade and Industry Court Act), abbreviated *GewGG* of 29 July 1890. They handled individual as well as collective labour disputes. It is interesting that individual and collective disputes over rights were to be decided through adjudication, while collective disputes over interests were to be decided through conciliation or non-binding arbitration.

The *GewGG* defined the task of the Courts as "[...) deciding the disputes arising between employers and workers [...]".[85] The Act did not define these disputes, but enumerated a number of specific disputes, such as the conclusion and termination of an employment contract. These disputes obviously constituted disputes over rights. The Act also stipulated that the Court could be seized "[...] as a conciliation agency, in disputes between employers and workers over the terms and conditions for work to be done in the future [...]".[86] This provision referred to disputes over interests, individual as well as collective.[87] In practice the distinction between the *Gewerbegericht* as a court or as a conciliation agency was hardly made. It frequently occurred that the *Gericht* was seized as a conciliation agency in rights disputes.[88] As a conciliation agency the *Gewerbegericht* could only become involved upon a joint request by the parties.[89] After hearing both parties, the *Gericht,* still acting as a conciliation agency, had to make an attempt at conciliating the parties. Should this attempt fail, then a decision having the technical character of a non-binding arbitral award, had to be taken by the *Gericht* as conciliation agency.[90] The *Gewerbegerichte* were not very successful, particularly not in collective disputes.[91]

During World War I, an institution outside the court system, named the *Nilfsdienst* (Auxiliary Service), was set up to avoid strikes and to direct employment in the strategic branches of industry. The *Hilfsdienstgesetz* (Auxiliary Services Act) of 1916 stipulated that in every military district of the Empire committees had to be formed to settle individual as well as collective disputes through arbitration. Such committees were composed of an equal number of representatives from the employers and workers and chaired by a military officer. Although the arbitral award issued was not legally binding, there was indirect compulsion to accept the award since the same committees had the power to grant or refuse *an Abkehrschein* (Certificate) enabling workers to

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[85] S. 1, *Gewerbegerichtsgesetz* 1890.

[86] S. 62, *Gewerbegerichtsgesetz* 1890. The word „conciliation agency" is used in this study as a translation for the German concept of *Einigungsamt* which is used in the Act.

[87] The ban on trade unions was lifted in Germany in 1869, when a new *Gewerbeordnung* (Decree on Trade and Industry) was promulgated. For socialist unions, the ban was re-introduced through Bismarck's *Sozialistengesetz* (Anti Socialists Act) in 1878.

[88] G. Königbauer (1971), *Freiwillige Schlichtung und tariffiche Schiedsgerichtsbarkeit,* Stuttgart, p. 21.

[89] S. 63, *GewGG.*

[90] S. 71, GewGG. The words "decision" and "arbitral award" are used as translations for the German concept of *Schiedsspruch.*

[91] E. Owen-Smith (1989), *Third party involvement in industrial disputes,* a case *study of West-Germany and Britain,* Aldershot, p. 24.

leave their work. This system is very similar to that provided by the Munitions of War Acts in Great Britain.

During the Weimar Republic, which lasted from 1919 until 1934, conciliation and arbitration of collective disputes over interests were removed from the *Gewerbegerichte* and entrusted to special conciliation and arbitration committees through the *Schlichtungsverordnung* (Conciliation Act) of 1923. Three years later, specialised courts were established to take over the adjudication of individual labour disputes from the *Gewerbegerichte*, that is the *Arbeitsgerichte* (Labour Courts). From then onwards the remaining category of collective disputes had to be submitted for arbitration to the *Tarifschiedsgerichte* (Arbitration Courts for collective labour agreements). It is noticed that this German three-track system closely resembles the Danish system for labour dispute settlement.

Together with this three-track system, a distinction in German legal terminology was introduced, that is the distinction between *Sehlichtung* and *Schiedsgerichtsbarkeit* in labour disputes. The former concept is exclusively used for disputes over interests and refers to a process whereby equitable or tri-partite bodies try to bridge the different views in a dispute. *Schlichtung* includes the possibility that the third party, if present, makes a proposal for a solution or issues an arbitral award, which is binding or non-binding, depending on what the parties have stipulated. *Schtichtung*, therefore, encompasses the methods of conciliation, mediation and arbitration. The concept of *Schiedsgerichtsbarkeit* is exclusively used for disputes over rights. It refers to the process of deciding legal issues, albeit that the parties themselves have appointed the third party who issues the award.[92]

From 1934 to 1945, during the Nazi era, labour relations were reorganised according to a corporatist model.

After World War II new *Arbeitsgerichte* were set up on the basis of the *Arbeitsgerichtsgesetz* (Labour Courts Act) of 1953 with a wider competence than the *Arbeitsgerichte* of the 1920s. Through the Act of 1953 a full-fledged system of labour courts was established handling individual as well as most of the collective disputes. There are three layers of labour courts: *Arbeitsgerichte* (Local Labour Courts), *Landesarbeitsgerichte* (Appellate Labour Courts) and the *Bundesarbeitsgericht* (Federal Labour Court).[93]

The *Arbeitsgerichtsgesetz* defines the jurisdiction of the Labour Courts precisely and exhaustively. The jurisdiction of the Labour Courts extends to:

1. collective disputes over rights, that is proceedings between parties concerning an existing collective agreement and all disputes over provisions of existing collective agreements, including peace obligations;
2. disputes relating to the establishment and functioning of works councils;
3. disputes relating to the recognition of trade unions;
4. individual labour disputes.

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[92] For a full discussion of the distinction see G. Königbauer (1971), o.c.

[93] The Federal labour court is regarded as "[...] the real master of German labour law [...]", in the words of Th. Ramm (1989), Germany, in *International Encyclopedia of Labour Law*, (R. Blanpain ed.), Deventer. The Court recognised, for instance, the right to strike, but at the same time limited this right through the doctrine of social adequacy. Wildcat strikes were never recognised. Strikes are qualified as tortious acts, if a peace obligation is violated.

The local, appellate and federal Labour Courts have a tri-partite composition. A professional judge sits on a panel together with two lay-judges, one representing the employers and one representing the employees.[94] The lay-judges are chosen by the Ministries of Labour at federal and *Land* (County) level from candidates nominated by trade unions, independent associations of employees, associations of employers as well as Government agencies. In practice, there is a widespread reluctance to accept the office of lay-judge. This may partly be due to the low financial compensation offered to lay-judges in exchange for the hours lost from work.[95]

The local as well as the appellate Labour Courts are under a statutory obligation to attempt conciliation throughout the proceedings. According to the *Arbeitsgerichtsgesetz* a special conciliation session is always held before the first oral pleadings. Such session, called the *Güteverhandlung* (Friendly Conciliation Procedure), is performed within two weeks after the claim is filed. The *Güteverhandlung* takes place before the chairman of the Labour Court. At this stage he sits alone. It is interesting, that during this conciliation session the lay-judges representing the employers and employees are not present.

The chairman investigates into and freely discusses all aspects of the case, including the social and economic background. The chairman takes an active approach and formulates a proposal for a settlement.[96]

If conciliation fails the proceedings should be resumed immediately. In practice, however, a period of approximately three months elapses before the proceedings enter into full for adjudication.[97] The *Arbeitsgerichtsgesetz,* however, stipulates that the Court must continue to conciliate during the adjudicatory stage. Ramm observed that 30 to 40% of cases filed with the local Labour Courts are conciliated.[98] In practice, attempts at conciliation are also made after the *Güteverhandlung.* It is estimated that yet another 25% of cases is settled before judgement and 10% of the appeals lodged with the federal Labour Court.[99] A practical reason, encouraging parties to conciliate, is the exemption from court fees, which is granted to parties agreeing to a settlement by conciliation.[100]

The *Arbeitsgerichtsgesetz* allows for arbitration clauses in collective agreements, excluding the jurisdiction of the Labour Courts. In individual employment contracts such clauses are not allowed.[101] The Labour Courts may, however, vacate an arbitral award violating a legal norm. The normative terms in an existing collective agreement are also regarded as legal norms.[102]

For collective disputes over interests, the post-war landscape of dispute settlement is different. On 20 August 1946, the Allied Control Council enacted the

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[94] In the *Burtdesarbeitsgericht,* however, the professional judges are in the majority: three professionals sit with two laymen.

[95] B. Aaron (1985), o.c., p. 23.

[96] R. Bender and C. Strecker (1978), Federal Republic of Germany, in *Access to Justice,* (M. Cappelletti and B. Garth eds.), Vol. 1, Book 2, Alphen aan den Rijn, p. 548.

[97] B. Aaron (1985), o.c., p. 24.

[98] Ibid., p. 24.

[99] Th. Ramm (1979), o.c., p. 207 and p. 208.

[100] B. Aaron (1985), o.c., p. 25.

[101] Arbitration, however, is allowed in individual disputes relating to firm and stage employment and to maritime transport, because there arbitration is customary.

[102] This is provided by the *Tarifvertragsgesctz* (Act on Collective Agreements) of 1949.

Kontrollratsgesetz (Control Council Act) No. 35, addressing the settlement of collective labour disputes generally. The Act, which has as yet not been repealed, first advises trade unions and organisations of employers associations to agree on private procedures for the settlement of collective labour disputes. The Act obliges the Ministry of Labour of each *Land* to establish a conciliation commission, which has to support the diffusion of private conciliation procedures and to institute a statutory conciliation procedure itself if necessary. The procedure envisaged for these conciliation commissions is entirely voluntary. A dispute can only be referred to these commissions with the consent of both parties. The settlement proposals or awards of the commissions are only binding if both parties agree to accept them.

In the early 1950s, the German Government prepared several drafts for a statutory conciliation procedure. The federal organisations of employees and employers, the *Deutscher Gewerkschaftsbund* (German Trade Union Federation), abbreviated *DGB* and the *Bundesvereinigung der Deutschen Arbeitsgeberverbande* (Confederation of German Employers' Associations), abbreviated BDA did not welcome such statutory procedure. It was regarded as interference by the Government.[103] The *DGB* and the BDA themselves drafted a detailed model conciliation clause and urgently asked their members to incorporate conciliation clauses similar to this model in their collective agreements. The model is known as the *Margarethenhof* Agreement, concluded on 7 September 1954.[104] The model was used in an increasing number of branches of industry. By 1956, already 48% of the employees in the private sector were covered by conventional conciliation clauses; by 1978 this percentage was 63%.[105] The influence of the *Margarethenhof* Agreement can be traced in nearly all conventional conciliation clauses.[106] This model has led to a far-reaching standardisation of conciliation, resulting in an almost uniform system of conventional conciliation clauses today. As a consequence of this successful initiative from the part of both sides of industry, legislation setting up statutory conciliation machinery never materialised. The old Control Council Act of 1946 remained in force, however, without having much importance.[107] Governmental conciliators have been installed only in the *Länder* Nordrhein-Westphalen and Baden-Württemberg. When collective bargaining becomes deadlocked and other settlement procedures, if any, fail the Government conciliators usually invite the parties to an informal discussion. Precise data on the working of these Governmental instances are not available.

Next to these conventional and statutory settlement procedures, Governmental conciliators intervene occasionally on an informal, *ad hoc* basis. This intervention usually is in a dispute which has been going on for a long time. Depending upon the size of the dispute and the skills of the conciliator, Ministers, Prime Ministers of the *Länder* and even the *Bundeskanzler* (Federal Chancellor) may be called to intervene.[108]

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[103] G. Plankers (1990), *Das* System *der institutionalisierten Konfliktregelung in den industrieflen Arbeitsbeziehungen in der Bundesrepublik Deutschland*, Pfaffenweiler.

[104] For an overview of the major characteristics of the *Margarethenhof* model reference is made to Th. Ramm (1979), o.c., p. 201 ff.

[105] E. Owen-Smith (1989), o.c., p. 39.

[106] Ibid., p. 39.

[107] Th. Ramm (1979), o.c., p. 200.

[108] Ibid., p. 200.

Chapter 5
Alternative dispute resolution system in Great Britain

1. Historical introduction

Industrial conciliation in Britain dates back to the time of Pitt the Younger, with a series of statutes in the second half of the nineteenth century, the so-called "pretentious legislation" of 1867 and 1872. These failed, however, in their aim of preventing disputes or industrial action arising from disputes.

The Acts were repealed in 1896 by the Conciliation Act, which for the following 80 years provided the legal basis for voluntary conciliation services provided by the state. During the last three decades of the nineteenth century there was greater local recognition of conciliation. Parliament abandoned attempts to find dispute settlement procedures within a quasi-judicial framework, and the voluntary element remained in the ascendancy. This voluntary principle stood alongside another principle, namely that of respect for autonomous institutions existing within particular industries.

The fillip required by the legislature in the nineteenth century was provided by the success of such autonomous machinery in the north of England. A. J. Mundella, an early industrial entrepreneur, established joint boards for the hosiery industry in Nottingham, with the proposition that "masters and men should get around the table and "talk it out" on a footing of equality".[109] By equality, he meant that employers and employees would participate in equal numbers. His own early casting vote was removed as an indication of the spirit of agreement seen as necessary in the continuing relationship.

The experience in Nottingham was one of reduced strikes, lock-outs and industrial violence, which encouraged the spread of these boards into other areas and other industries. Even when the boards were overtaken by developments in industrial relations, notably the rise of the national trades unions, the agreements the boards had achieved remained. The boards were almost always replaced by a different form of autonomous dispute resolution machinery, which enjoyed early TUC support. In its 1888 Congress, the TUC noted that they "increased understanding and peaceful settlement". These early experiences set the agenda and established the basis for future industrial dispute resolution.

Parliament's approbation of a voluntary system of industrial dispute resolution reflected the fact that many aspects of employment law were not legally grounded. For example, a prominent role was given to custom in defining the employer/ employee relationship, including the duties of fidelity and mutual trust and confidence.

The Industrial Courts Act 1919, which had marked similarities to the 1896 Act, also sounded the death knell for the last remnants of state laissez-faire in industrial relations and industrial disputes. The new role for the state would be a hands-off approach, encouraging without forcing, by supplying the means, funding and if necessary the location for conciliation.

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[109] Sharp, Industrial Conciliation and Arbitration in Great Britain (1949) at p. 466.

In the twentieth century, despite a substantial level of tripartite co-operation in the two World Wars, it was clear that both employers and employees would react with indignation to any state involvement in their disputes. State policy is still largely unchanged today, notwithstanding the challenges to the voluntary system of industrial relations by a series of income policies and enforced wage restraints, by the growth in regulation and by the legislature's intervention in certain key industries: that is, to encourage autonomous institutions with the option of recourse to a standing, independent arbitration and conciliation service funded by the state. Notwithstanding the institutional expansion of government regulatory agencies, including Industrial Tribunals (established in 1964), the Central Arbitration Committee, and the Advisory, Conciliation and Arbitration Service (ACAS, established in 1974), it remains true to say that most disputes are conducted outside state-supplied machinery. Parliament remains largely committed to this self-regulation in most sectors of industry. Consequently, ACAS officers are statutorily required to have regard to the desirability of using and exhausting voluntary procedures before they intervene in collective disputes.[110]

The twin considerations of effective dispute resolution and cost effectiveness are obviously applicable in the employment context, but are overshadowed by the principle of "good industrial relations", that seems the raison d'être of legislation in this area throughout the twentieth century. Conciliation and mediation offer the means to have disputes listened to and dealt with by an independent and impartial body. This has been shown to prevent, or at least lessen or delay, industrial action. It may be no coincidence that ACAS's busiest year for collective dispute resolution (1991) was also the year of the lowest number of stoppages or other forms of industrial action recorded this century.[111]

2. Rationale for ADR in industrial disputes

The historical introduction to industrial mediation outlines the background to the present approach to labour disputes.

Employers and employees are in a special relationship which will invariably have to continue after the dispute has been resolved. Their disputes are not necessarily amenable to judicial pronouncement, especially where complex and many-sided agreements are concerned and where it may not be appropriate for the solution to involve having one party as a winner and the other a loser, as occurs in most traditional court litigation.

It is generally accepted that the best solutions to disagreements between employers and employees are those which are arrived at through negotiated agreement, usually through an element of mutual give and take. Such agreements can be tailored to the needs of the parties, rather than imposed upon them. This creates the optimum conditions for a satisfactory continuing working relationship, whereas litigation is more likely to lead to a hostile working environment.

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[110] Employment Protection Consolidation Act 1978, ss.133(5), 134(4); Sex Discrimination Act 1975, s.64(3); Race Relations Act 1976, s.55(3).

[111] ACAS Annual Report 1991, with 1,386 references for collective conciliation.

Many people are affected by an industrial dispute: the employers, the employees, their families and sometimes even the surrounding geographical area or associated industries, making an agreed settlement the most desirable outcome.

Disputes may often be about the very agreements that sought to avoid industrial action. Again, it is preferable that these be resolved by agreement.

In the United States, as in the United Kingdom, it was in the field of labour disputes that conciliation and mediation were initially used, dating back to the nineteenth century. Disputes in this field generally fall into two categories: grievance disputes, which arise in relation to the application of collective bargaining agreements or complaints by individuals about alleged breaches of employment terms or conditions; and collective bargaining, which involves issues regarding the terms of proposed new collective agreements.[112]

As will be observed, grievance disputes tend to relate to existing rights, whereas disputes concerning collective bargaining agreements relate to prospective and not existing rights, and consequently are viewed as interests rather than rights. This distinction between rights and interests affects the nature of the dispute resolution machinery which may be employed: in relation to rights resolution, the neutral deals with the interpretation and application of the terms of an existing agreement, whereas in relation to interest resolution, the neutral is required to determine the terms that will apply in the future.[113]

While arbitration remains the principal procedure used in collective bargaining agreements in the United States, mediation plays an increasing role both in the bargaining process leading up to an agreement and in relation to disputes arising from alleged breaches of those agreements.[114] Mediation has commonly been used in disputes over interests in the context of negotiating collective bargaining agreements. However, its extension into the rights context in the United States has been described as one of the most promising innovations in the grievance procedure prior to arbitration.[115] Arbitration, despite its advantages, over litigation, of relative informality and specialised knowledge of the context of the dispute, still suffers from its inability to provide expeditious, informal and inexpensive dispute resolution. It still involves the same limitation as other forms of adjudication including litigation, namely the fact that it must provide a winner and a loser, without scope to create a resolution that takes into account the varying needs, interests and concerns of the different parties and the nuances so often inherent in a complex consensual settlement. The confrontational context of arbitration and its win-lose outcome can often have negative consequences in terms of parties' satisfaction, perceptions of fairness and compliance with decisions.[116]

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[112] See Murray, Rau & Sherman, Processes of Dispute Resolution: the Role of Lawyers (1989) at p. 309.

[113] See Murray, Rau & Sherman, ibid. at pp. 404-409, quoting also from Craver, „The Judicial Enforcement of Public Sector Interest Arbitration" at 21 B.C.L. Rev. 557, 558 n. 8 (1980)

[114] See Murray, Rau & Sherman, ibid. at p. 308; also at p. 421 quoting from the U.S. Department of Labor "Characteristics of Major Collective Bargaining Agreements" (1981) that an estimated 96 per cent. of U.S. collective bargaining agreements provide for the arbitration of grievance disputes.

[115] See Deborah M. Kolb's article "How existing procedures shape alternatives: the case of grievance mediation" in the Journal of Dispute Resotution Vol. 1989 at p. 73.

[116] See Kolb, ibid. at p. 72.

These considerations have led to the increasing usage of conciliation and mediation in the industrial arena in the United States and in the United Kingdom and elsewhere, including Canada[117] and South Africa.[118] Conciliation is viewed as a preliminary step to be undertaken before arbitration is commenced, and used after the ordinary negotiation stage has been found to be inadequate but before parties turn to adjudication. A steady continuation in the growth of the use of ACAS conciliation could have be seen during the last decade.[119]

3. Advisory, conciliation and arbitration services in labour relations

However, it is well known that there has in Britain been a widespread reluctance and even resistance to the extension of law and the jurisdiction of the courts to the field of industrial relations, which was reinforced by the experience of the Industrial Relations Act of 1971 and the Industrial Relations Court set up by it. Indeed, this abstention of the law has been regarded by many as a characteristic of British industrial relations. It is at present more marked at the collective level, in the relationships between trade unions and companies and employers associations and the absence of regulation of collective bargaining and collective agreements than at the level of the individual employee. Large amounts of individual employment law have quietly and without great fuss been entrusted over the years to the industrial tribunals first set up in 1964 which have become accepted as an appendage to the traditional court structure.

In the collective field the role of Government has been for the most part restricted to providing facilities for the resolution of disputes, encouraging the development of negotiation, dispute and disciplinary procedures and of collective bargaining. The Government has offered facilities for conciliation, mediation and arbitration and has had the power to conduct inquiries into industrial disputes since 1896. In 1919 a standing arbitration body was set up under the name of the Industrial Court and at the same time provision was made for the Government to set up Courts of Inquiry into major disputes. There was no compulsion to use the Industrial Court or its successor, more appropriately named the Industrial Arbitration Board.

The Labour Government set up ACAS in 1974 as an independent advisory service following the collapse of the Conservative Government's attempt to impose greater legal regulation on industrial relations and the abolition of the Industrial Relations Court.[120] It consists of a Council of a full-time Chairman and nine part time members, three appointed after consultation with organisations representing workers, three after consultation with employers associations, and three independent members. Legislation

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[117] See Kolb, ibid. at p. 73.

[118] IMSSA, the Independent Mediation Service of South Africa, has been in the forefront of industrial mediation activities in that country, and has been instrumental in the resolution of a number of major disputes, including those with significant economic, political and social implications such as a potentially crippling rail dispute.

[119] See the ACAS annual report for 1989, and the Encyclopaedia of Employment Law and Practice ACAS 2.2.

[120] Its first terms of reference were set out in a letter from the Secretary of State for Employment which is printed as an Appendix to its firts Annual Report for 1975.

expressly forbade any interference by Government in the performance of its functions.[121]

ACAS took over the collective advisory, conciliation, mediation and arbitration functions previously performed by the Government's Department of Employment. It was also given a general power to conduct investigations and to draft Codes of Practice for the conduct of industrial relations. In addition to these general voluntary functions it was also given a specific role to play, in conjunction with the new Central Arbitration Committee, which replaced the Industrial Arbitration Board, in disputes arising under the Fair Wages legislation and in disputes about claims by trades unions to be recognised by employers for the purposes of collective bargaining. Like the Commission on Industrial Relations[122] which had had these responsibilities before it, it was required in its performance of its functions to have regard to the need to improve industrial relations and in particular the extension of collective bargaining. The role of the Department of Employment in relation to individual employment disputes was also transferred to it. In a number of cases coming before the industrial tribunals, set up in 1964, notably unfair dismissal cases, and, later, cases involving allegations of discrimination on the grounds of sex or race, it was required to offer its conciliation services whenever requested and even without a request if it considered that there was a reasonable prospect of securing a settlement.[123] In the variety and scope of its functions, linked for the most part only by the fact that their performance required an expertise and experience in industrial relations ACAS resembles, on the surface at least, the OFT.

So far as collective disputes are concerned ACAS divides its functions up into conciliation, mediation and arbitration. ACAS may be involved in conciliation as a result of the request of one or both parties or it may have taken the initiative of reminding the parties that it is available or even have offered its services. It has described the role of a conciliation officer as being to provide a calm and informal atmosphere, a patient understanding of the difficulties and knowledge and experience of industrial relations. He/she probes and identifies areas of agreement and disagreement, and acts as an intermediary between parties in dispute, conveying proposals without the formal commitment that direct negotiations sometimes require. He/she makes suggestions at appropriate times on how to make progress towards a settlement. Responsibility for the settlement lies with the parties and the Service does not exert pressure on either party in order to achieve a settlement".[124] He/she has no power other than those of persuasion. He/she has to win the confidence of the parties and part of the experience he brings with him/her is not only a general knowledge of

[121] It asserted its independence in 1975,1976 and 1977 by refusing to instmct arbitrators appointed by it to implement the Government's policy on wage increases.

[122] The Commission had been set up on the recommendation of the Royal Commission on Trades Unions and Employers Associations, Cmnd. 3623, 1968 (the Donovan Commission).

[123] The Donovan Commission had recommended [para. 584] that it should be the duty of the industrial tribunals to bring about an amicable settlement and suggested that a round table conference should be held before the hearing between the parties and members of the tribunal in an effort to achieve a settlement. It wanted further attempts to be made later in the proceedings as well. It noted fhat experience abroad had shown that labour tribunals were able to settle a large proportion of cases and saw no reason why the same result should not be achieved in Britain. The task of conciliation was in the event given first to the Department of Employment and then transferred to ACAS along with the Department's other conciliatíon functions.

[124] ACAS Annual Report for 1975, p. 8.

industrial relations but also contacts which he/she has developed over the years with both employers and union officials.

3.1. Terminology

In the labour field, there is a distinction between the usage of the terms "conciliation" and "mediation".

A. Notwithstanding that *conciliation* is extensively used in practice in the industrial dispute arena and that its utilisation is referred to in a number of statutes, it is not defined in any English statute in this context. The definition of conciliation formulated by the International Labour Organisation in 1983 has been followed by ACAS, namely that it is: „...the practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. It is a process of orderly or rational discussion under the guidance of the conciliator.[125]

Conciliation in the labour field can be individual; for example in relation to claims for unfair dismissal or other complaints by individuals that their rights under employment protection legislation have been infringed, or collective, in relation to trade disputes; for example with regard to pay or working conditions where employers and trade unions are in dispute.

Not only is the conciliation process voluntary, but it is conducted in a non-directive way with the minimum of intervention by the neutral conciliator. The conciliator will have his or her own preferred method of working in each individual dispute and facilitating negotiations between the parties, which may involve joint or separate meetings with them but which will invariably leave responsibility for the outcome firmly with the parties themselves.

B. Mediation, however, in this context, involves a process in which the neutral mediator takes a more pro-active role than the conciliator in the conciliation process, making his or her own recommendations for the resolution of the dispute, which the parties are free to accept or reject.

ACAS distinguishes between mediation and conciliation as follows: "Mediation may be regarded as a half-way house between conciliation and arbitration. The role of the conciliator is to assist the parties to reach their own negotiated settlement, and he may make suggestions as appropriate. The mediator proceeds by way of conciliation but in addition is prepared and expected to make his own formal proposals or recommendations, which may be accepted as they stand or provide the basis of further negotiations leading to a settlement. Such recommendations may be similar in form to an arbitrator's award, but the crucial difference is that the parties do not undertake in advance to accept them."[126]

If a dispute is to be referred to mediation, three statutory conditions must be met: the consent of all parties is required; any agreed procedures should be fully used; and

[125] Industrial relations disputes: the ACAS role" by the Advisory, Conciliation and Arbitration Service, in A Handbook of Dispute Resolution: ADR in Action (1991) by Karl Mackie (ed.) at p. 104.

[126] ACAS, The ACAS role in Arbitration, Conciliation and Mediation. 1989.

parties are expected to have made every effort first to resolve the matter through conciliation.[127]

3.2. Conciliation

As already indicated, there are two kinds of conciliation which may be undertaken by a conciliation officer (COT), the one being collective conciliation and the other individual conciliation. The conciliation process is likely to be used by parties who may be contemplating or who have contemned action including perhaps arbitration, and in entering into this process, the parties reserve their right to continue with such action if that becomes necessary.

Conciliation meetings can be set up quickly as the arrangements to be made are informal. The machinery and methods used by the COT are likely to be quite similar wherever the conciliation is undertaken, partly due to ACAS's success with those methods and partly by reason of a history of shared traditions and training. There will obviously, however, be differences of detail depending upon the needs of the individual case and the approach of the individual conciliator.[128]

The conciliation process usually begins with a preliminary "briefing" meeting at which the conciliator's aim is to get an understanding of the issues and the attitudes of the parties. The parties may provide him with documents or he may have to rely on his own questioning and other sources such as records on file, press cuttings and the knowledge of colleagues. Some of the information may emerge later in joint meetings of the parties. He may decide that the differences between the parties are so wide and attitudes so rigid that there is no point in arranging a joint meeting under his chairmanship. Even where joint meetings are arranged there will often be side meetings with the parties individually at which he may be given information in confidence, about the limits, for example, to which a party can go in seeking a settlement, or a concession which they regard as essential. The general aims of the conciliator in a side meeting are to encourage the participants to speak freely, to reduce any feelings of tension and above all to adopt a problem-solving approach to the resolution of the dispute. The meetings may also give the conciliator an opportunity to learn more about the personalities of the parties which may affect the possibilities of a settlement, just as joint meetings gives him an opportunity of observing the parties in their direct relationship with one another. The sequence and pattern of these meetings is mainly determined by the conciliator. The duration of the meetings may vary. The actual process may be short, involving one or two visits to a company or a few meetings at an ACAS regional office. Other cases may take days or even weeks. Hence the need for strong commitment on the part of the conciliator.

Most of the conciliator's work is done in oral discussions and it is not usual for the discussions to be recorded. The parties are encouraged to talk freely. Where, however the dispute is complex or there is a matter of principle at stake, a party or the conciliator may draft a proposal for a settlement as the basis for further progress. Even then the written agreement between the parties settling the dispute may be based on

[127] Encyclopaedia of Employment Law and Practice by Frank Walton, published by Professional Publishing.

[128] Henry J. Brown and Arthur L. Marriot: ADR principles and Practice, Sweet & Maxwell, London, 1993 pp. 208-217.

unwritten reservations or understandings that the parties are unwilling to commit to paper.

3.3. Mediation

A mediator appointed in relation to an industrial dispute may use all the same methods and procedures utilised by a conciliator, but the fundamental difference between the two processes is that the mediator can in addition make recommendations to the parties for the resolution of those aspects which they cannot themselves settle.

Mediation moves one step nearer arbitration and adjudication with the mediator acting as a conciliator but also making his/her own proposals or recommendations for a settlement which may be accepted or used as the basis for further negotiation. It is not a common method of dispute settlement but may be used where the parties are unwilling to bind themselves beforehand to accept an award.[129]

The parties are under no obligation to accept the mediator's recommendations, and this distinguishes the process from arbitration, where the arbitrator's findings are binding.

Parties will generally, but not invariably, provide written statements of their case to the mediator and to one another prior to the mediation process being commenced. They will also furnish a bundle of relevant documents. If this course is to be followed, it should be done reasonably well before the date fixed for the first mediation meeting so that the mediator can obtain supplementary information if required, including perhaps meeting separately with the parties or with individual employees, or making such other inquiries as he may consider useful and appropriate.

As with conciliation, the mediator may hold separate, joint or caucus meetings, and may use a range of skills and techniques to try to assist the parties in arriving at an agreement. He will seek to establish a constructive ambience for negotiation, will create an acceptable agenda and try to work to it, will manage the process and chair the proceedings, will control any personality conflicts that may occur, and will generally try to facilitate a settlement.

At the conclusion of the mediation, the mediator will prepare a report and submit it to ACAS to be sent to the parties. If the issues have been resolved, the report will contain the terms of settlement but if they are unresolved, then the report is the vehicle in which the settlement recommendations of the mediator are contained. Parties may accept the recommendations, or reject them and go to a tribunal or take other proceedings, or may revert to conciliation through an ACAS conciliator using the recommendations as a basis for further discussion and negotiation.

Mediation is not generally regarded as suitable for straightforward distributive conflicts[130] such as annual pay claims. It is appropriate, however, for those cases where a form of conciliation is required, but it is felt that a higher level of intervention is

[129] Annual Report for 1979, p. 19.

[130] For a distinction between distributive and integrative bargaining see Chap. 5 at p. 89.

needed than conciliation allows. It can also be more appropriate than arbitration for complex and interdependent issues, such as major reorganisation of jobs.[131]

3.4. Arbitration

Arbitration is the most formal of the methods of settling collective disputes. It is regarded as most suitable where the issue is clear cut or concerns the interpretation of an agreement. It depends on the parties being able to agree on terms of reference which will sufficiently identify the differences between them and the issues that the arbitrator is being asked to decide. It is not regarded as suitable for issues of principle such as a recognition dispute or a complex many sided dispute. In some cases collective agreements include a provision for ACAN to provide arbitration in case of disagreement. In others ACAS is asked to help on an ad hoc basis. In either case it is not ACAS officials who arbitrate. They appoint arbitrators either to sit alone or, where a major dispute is involved, as a Board, from panels made up of academics, retired conciliation officers, lawyers, trade union officials and managers, taking into account the arbitrator's status in relation to the importance of the dispute, the location, the need for special expertise and availability.

The procedure is informal though it usually involves the exchange of written statements and an oral hearing. The whole process is confidential and conducted in private and awards are not published. The parties are not usually represented by a lawyer and legal representation needs the consent of the arbitrator. ACAS will only arrange arbitration if the parties agree to be bound by the award.

At the individual employment level[132] provision is made for copies of all relevant claims to the industrial tribunals to be sent to the regional offices of ACAS together with the respondent's reply and any other communication between the parties and the tribunal.

3.5. The conciliation officer

The local conciliation officer may then offer his/her services if he/she thinks there is a reasonable prospect of a settlement, or at the request of the parties. In performing this function the conciliator does not act either as a representative of either party or the tribunal. All discussions with him/her are confidential and their content is not revealed to the tribunal if the attempt at conciliation fails. In practice, it seems, he/she does not attend the hearing. The discussions are also confidential in the sense that a party may say things to him/her in confidence which he/she may not then communicate to the other party. He/she is also required to tread a delicate line between giving advice on the law, the effect of past cases, the rules set out in any relevant Code of Practice such as that on Disciplinary Practice and Procedure, procedure and the methods of

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[131] See ACAS article in Mackie, Handbook of Dispute Resolution at p. 111. As to the suitability of mediation for complex, interdependent issues, see the note on polycentricity in Chap. 12 at p. 234. – Henry J. Brown and Arthur L. Marriot: ADR principles and Practice, Sweet & Maxwell, London, 1993. pp. 208-217.

[132] See generally "Conciliation in complaints by individuals to industrial tribunals the ACAS role". ACAS 1979.

calculating compensation on the one hand,[133] and commenting on the merits of the parties' cases. ACAS' own rules apparently permit him/her to point out the strengths and weaknesses of each party's case as he/she sees them and require him/her to draw the attention of a party to the fact that the tribunal can punish frivolous or vexatious complaints by an award of costs. He/she may also warn an employer, it seems, who is prepared to reach a settlement of an unfounded claim simply to avoid the trouble and expense of a hearing of the danger that this may result in other unfounded claims being brought against him/her. Apart from this however it is not part of his role to vet, check or even comment on the fairness or justice of a proposed settlement. What he/she has to do is to check that it really represents what each party wants, which is particularly important as any settlement in which the conciliation officer is involved will act as a bar to further proceedings before the tribunal. Indeed it is the only effective bar as a simple agreement will not suffice. As a result settlements negotiated without the involvement of the conciliation officer will be brought to him/her to be registered in order that a bar will effectively be created.

The actual process of conciliation involves a to-ing and fro-ing between the parties or their representatives,[134] who may be lawyers, in an effort to identify the salient points of difference between them in what ACAS describes as essentially "a negotiating and bargaining process".

3.6. The tasks of the ACAS

ACAS inherited its role under the *Fair Wages* legislation from the Commission on Industrial Relations set up in 1971. Under the Employment Protection Act 1975 (s.1 l) a trade union could complain to ACAS that an employer of its members was not observing the agreed terms and conditions of employment which covered him, or where there were no such terms, the general level of terms and conditions of employment observed by comparable employers in the district concerned. ACAS was under a duty to attempt conciliation. If this failed it would refer the dispute to the Central Arbitration Committee which could make an award in favour of the union. The award set out the terms and conditions that were to be incorporated into the contracts of employment of those concerned, which means they could be enforced in the ordinary courts.

This function under the fair wages legislation was removed in 1980 as was its function in relation to recognition questions. Although the recognition jurisdiction is now a matter of past history, as a case study of dispute settlement it is probably the most complex and illuminative of the functions of ACAS. Only the outlines can be sketched out here. The right given to a union to apply to ACAS for a recommendation that it should be recognised has been described as "the most contentious and for senior ACAS officials the most time consuming of the trade union rights provided by the

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[133] In discrimination cases he may draw the attention of the complaint to the possibility of help from the Commission for Racial Equality or the Equal Opportunities Commission.

[134] ACAS has said that „the involvement of representatives inevitably makes conciliation more cumbersome and time-consuming, since after the meeting with the conciliation officer the representative normally has to consult with the party before further progress can be made. It is often difficult to arrange appointments at short notice with busy representatives, particularly lawyers and trade union officials", *op. cit.* n. 27.

Employment Protection Act.[135] The process was criticised by unions as too slow and ineffective.[136] ACAS was criticised by employers as being biased in favour of the unions and ACAS itself complained both that the particular regulations under which it was asked to operate were too restrictive and, more generally, that its functions in relation to recognition did not fit well with its other functions where its stance was more patently neutral.[137]

The *Employment Protection* Act 1975 authorised a union to apply to ACAS for recognition as a bargaining agent.[138] It then became the duty of ACAS to conduct the inquiry into such matters as the amount of support the union had in the company and the opinion of the workers, the organisation structure of the company, its industrial relations, institutions and procedures, the jobs done by the employees, the general practice of the industry and the history of the dispute. The legislation left it largely to ACAS itself (as it had to the Commission on Industrial Relations before it) to work out the relevant criteria for recognition.[139] At the end of its investigations ACAS was authorised to make a recommendation in favour or against recognition. If this was not accepted by the employer the union could make a further application to ACAS which would then refer the matter to the Central Arbitration Committee. As in the case of the Fair Wages legislation the powers of the Central Arbitration Committee were limited to making an award the effect of which was to incorporate terms and conditions into the contracts of employment of the individual employees. The Committee took the view that this did not allow it to include a right to the recognition of the union or any other collective rights but only terms and conditions which could themselves have been the subject of collective bargaining.[140] The recognition question still remained open. Hence the criticism of the weakness and ineffectiveness of the procedure as a means of achieving recognition. It was clear that some of this criticism was misplaced. The process was deliberately long drawn out since the object throughout was to try and achieve not a compulsory decision but an agreed settlement. Efforts at conciliation began with the earliest inquiry by ACAS into the facts of the situation. The process of fact finding began informally with discussion with the parties. Sometimes this was enough to clear away misunderstandings and pave the way to agreement e.g. by

[135] Brian Weekes, "ACAS - An alternative to law?" Industrial Law Journal. 1974, p.141.

[136] It was aptly described in the Report of the Inquiry into the Grunwick Dispute conducted by Lord Scarman as strong in principle but slow in implementation (para. 28). It was a process which putting great pressure upon an employer to recognize a union, imposes no direct sanction for a failure to do so. (ibid.).

[137] In its Annual Report for 1976 it said (p. 59) that «it was important to distinguish the Service's operational activities where it guards its reputation for impartiality, from the broad direction of policy in which the Service is steered by the Act's requirement that the extension of collective bargaining is to be encouraged... The Service clearly understands it to be the general intention of Parliament that it should be positive in promoting collective bargaining, based on trade union recognition, as the best method of conducting industrial relations.» Contrast this with its view on the advantages of having a single body which could provide a comprehensive industrial relations service to industry and which emphasised the way in which its other functions overlapped and complemented one another. (Set out in its Annual Report for 1975, p. 7). Cp. Annual Report for 1975, p. 26.

[138] For the procedure in general see ACAS Annual Report for 1976, pp. 42 ff.

[139] ACAS itself argued for the need for a flexible approach. It said that osince the detailed characteristics of each ease vary the conctusions will vary. The Service has no automatic rules to apply, but it is always guided by its general statutory duty of promoting the improvement of industrial relations and of encouraging the extension oi collective bargaining... The aims of the Service is to obtain a broad picture of the facts and circumstances of each individual case from which to decide whether effective, viabte, collective bargaining machinery could be established and sustained in a way which would provide a basis for stable industrial relations.»

[140] See for example its Annual Report for 1978, p. 17.

identifying the group of workers which it was appropriate for the union to represent or by establishing the extent of support for the union among them. Agreement might at this stage be reached for phases recognition, beginning with particular groups or topics and extending over a period. Similarly the opportunity was taken at each further stage of the proceedings to come to an agreement e.g. after the inquiry into the opinions of the workers had been set out in a draft report. If no settlement was reached at this stage ACAS would then move on to the more detailed investigation into the position of the workers, the organisation of the plant and the general background of the dispute. In doing so it would try to consult the parties to discover their views on such matters as the identification of the appropriate bargaining unit, the extent of support that would be regarded as adequate to justify recognition.

Again before a final report was written a draft report would be sent to the parties in the hope that it would provide the basis of an agreed settlement and conciliation attempts could continue even after the report was published. Conciliation efforts were again undertaken if the union came back to ACAS asking for the matter to be referred to the Central Arbitration Committee which again provided every opportunity for an agreed settlement, with the assistance of ACAS officials.

In keeping with its general attitude to alternative procedures ACAS was at pains to emphasise that its role was secondary to alternative means of settling a dispute. Where for example a recognition issue involves a dispute between two unions affiliated to the Trades Union Congress the TUC has its own Disputes Committee for dealing with such disputes and a set of general principles (the Bridlington Agreement) to govern the unions' relations with each other.[141] The TUC had advised affiliated unions not to use the statutory procedures without consulting other unions affected and seeking their agreement. ACAS itself adopted a policy of drawing this to the attention of affiliated unions who made a reference to them.

It was perhaps to be expected that in such a controversial area ACAS would find itself under attack in the courts. In the litigation in which it was involved the House of Lords on the whole showed more sympathy to it than the Court of Appeal under Lord Denning who showed clear concern for the way in which recognition of a particular union could be seen as an interference with the freedom of choice of individual employees. The House of Lords, for example, held that in making a recommendation ACAS was entitled to strike its own balance between the general requirement upon it to work towards an improvement of industrial relations and the more particular obligation to encourage the extension of collective bargaining, whereas the Court of Appeal had insisted that the latter goal had priority and had characterised ACAS regard to the possibility of recognition leading to industrial action by other unions in the industry as giving way to the threats of the big battalions.[142] It was the House of Lords too which upheld the practice of ACAS of delaying the conduct of a reference to give the UTC's Disputes Committee and opportunity to settle the issue provided this did not amount to a refusal to perform its statutory functions.[143] Both the House of

[141] Annual Report for 1976 p. 42. For the work of the TUC Disputes Committee see e.g. P.J. Kalis. The effectiveness and utility of the Disputes Committee of the Trades Union Congress. 16 British Journal of Industrial Relations 1978, p. 41.

[142] ACAS v. OKAPE [I980] IRLR 124.

[143] EMA v ACAS and UKAPE [1980] IRLR 164.

Lords and the Court of Appeal however upheld the claim of an employer that he was under no obligation to assist ACAS in the conduct of its inquiries by allowing it access to his premises or even providing the names and addresses of his workers.[144] It was this decision which confirmed ACAS's view that it was unable to operate effectively against non-co-operative employers and had led it to ask for the legislation to be amended to give it wider powers.[145] Legislation was introduced into Parliament by two individual Members of Parliament, without Government support, with the intention of making such changes. In the event it was the criticism not of the weakness of the procedures but the procedure overall that prevailed and the Conservative Government abolished it in the Employment Protection Act 1980.

As will be seen from the account of ACAS functions the Central Arbitration Committee has a role to play both in relation to the Fair Wages legislation and the recognition procedures.[146] In each case it was authorised to make an award which had the effect of incorporating the terms and conditions it recommended in the contract of the relevant workers. To this extent it was unusual in the field of labour relations as having a compulsory element in its awards. In addition, as successor to the Industrial Court and the Industrial Arbitration Committee, it was also available for the voluntary arbitration of collective disputes. Its particular interest for this paper however is the effort it has made to articulate the philosophy underlying its approach to its work which provides a useful contribution to the general debate of the way in which a body of its kind should perform its functions. In its Annual Report for 1976 it said, for example, that it was „not a court in the traditional sense. Its proceedings and hearings are structured so as to achieve complete informality. The aim is to encourage the approach by way of problem-solving rather than by emphasising the aspects of conflict and verdict. Above all there is a commitment to social and industrial relations and workable solutions."[147] This flexible approach, it admitted,[148] was not always possible since in some cases legislation had laid down the particular approach to be adopted. „The committee operates within a legal framework, but endeavours to appreciate the underlying industrial problems. Sometimes unfortunately the requirement to adhere to the legal provisions in the framework may seem to indicate a lack of appreciation of the industrial relations problems. This is not intentional. The Committee would always wish to be aware of the impact of its awards on relationships so that, where discretion is properly available, the better result can be achieved". To this end parties were encouraged to discuss the background of the cases. „[O]n occasions awards are inevitably given which appear to ignore other difficulties or which themselves create further problems." If however the parties were prepared to discuss the underlying

[144] Grunwick Processing Laboratories Ltd. v. ACAS [1978] 1RLR 38. The "Grunwick affair" was also the subject of an inquiry chaired by Lord Scarman in 1977.

[145] Annual Report for 1979 p. 8. For a general review of its experiences see Annual Report for 1980.

[146] It also has statutory responsibilities in relation to the refusal of employers to disclose to unions information needed for effective collective bargaining as well as being available as a forum for voluntary arbitration.

[147] Cp the Comment of Paul Davies, "Arbitration and the Role of Courts", 9th International Congress, *International Society for Labour Law and Social Security*, 1978. "The Committee sees itself as undertaking the ambitious task, not of producing merely a solution to the problem as defined in the terms of reference, but of at least contributing to the solution of the underlying industrial relations problem of which the issue identified in the terms of reference may be only a symptom".

[148] Annual Report for 1977, para. 4.6.

issues "every effort will be made to minimise this problem although it cannot always be eliminated".

The approach of the Committee is reflected in its procedure.[149] The parties are encouraged to exchange written statements before the hearing which is used to amplify and explain them. Parties are still free to bring new material forward but were encouraged to include as much of the factual detail as possible in their written statements. Formal cross-examination as a mode of challenging evidence is discouraged. "The aim" the committee said "is to keep the challenges which the boundaries set by the main objective of clarifying the evidence and issues. The Committee hopes to prevent the parties or witnesses from feeling that they are taking leading parts in a murder trial. They are encouraged to assist the Committee by evidence as to the facts and opinions with, as far as possible, participation in the task of problem solving, which in the ultimate, lies with the Committee.[150]

3.7. The structure of award

The problem solving approach was also reflected in the structure of its awards. The Industrial Court had started out with the ambition of building up a kind of industrial case law in its decisions but had eventually taken the view that it was probably wiser not to give reasons. It's awards therefore took the form of a statement of the terms of reference and the background to the dispute, the main submissions of the parties and a very brief award. There have long been two views about the desirability of giving reasons in arbitration cases in the field of industrial relations. One of the predominant views appear to have been that the giving of reasons is inadvisable. Arbitration cases usually come at the end of a long period of dispute and often follow conciliation. The parties are well aware of all the issues. What they want above all is settlement. To give reasons is to invite yet another reconsideration of the various issues – with a good chance of – renewed strife. The nuances of the words chosen to express the reasons may rekindle old disputes". But, the CAS said, that there were also strong arguments in favour of giving reasons and modern practice was tending to expect all decision makers to give reasons. only if reasons are given can a consistent pattern be seen to emerge from the various decisions in the same or related areas. Reasons enable other disputes to be voluntarily settled or parties to disputes which are submitted to prepare their eases more effectively." The CAS therefore adopted the practice of including in its awards a passage dealing with "General Considerations". This practice fitted in with their problem solving approach as they could include matters not strictly within their terms of reference which could not properly be included in their award. They were "not intended to be a formal complete set of reasons. They will rarely be drafted with legal precision, in the sense that each award can be taken as carefully weighed

[149] Annual Report for 1976, para. 3.5.

[150] In its preference for agreed solutions the CAC adopted a liberal policy toward allowing a ase to be interrupted to give the parties an opportunity of working toward a solution or narrowing the area of dispute, often with the help of officials from Acas.

policy. It is expected that they will be read by the parties as a guide – not as a precise legal judgement."[151]

The Committee recognised that as it sat in panels of three members and each panel was allowed complete autonomy there was a problem of monitoring consistency. While placing considerable value therefore on flexibility and the need to deal with particular difficulties sympathetically "reasonable consistency" was also a goal.[152]

4. Conclusion

One of the criticisms of the use of conciliation or mediation in the industrial context (which mirrors some similar criticism in other fields of activity) is that it may not necessarily be appropriate to the dispute which is referred to it, and that the time, energy and cost spent in the process may be wasted. For example, in a recognition dispute, there may be no common ground, nor any agreement on the facts as to the extent of trades union membership. What might be required, initially in any event, would be a thorough investigation prior to negotiations, rather than a conciliation or mediation role. Parties might nevertheless select conciliation in the hope that it will provide answers where all else has failed; but the conciliation may prove to be fruitless.

While some risk must exist that parties may see conciliation as a panacea which will produce results for them in circumstances where that would be unrealistic, in practice it is unlikely that trained conciliation officers would allow this to occur. It is more probable that they would identify those kinds of disputes which would not be amenable to conciliation, and would make this clear to the parties, rather than taking them through a fruitless exercise.

Another question that may need to be addressed is whether mediators are more interested in securing agreements than with the contents of such agreements. This is rejected by ACAS, whose work relies on their reputation and the efficacy and endurance of the agreements which they help parties to reach. The long-term survival of the settlement is of primary importance, as ACAS takes to heart the "good industrial relations" obligation in the Employment Protection Act.

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[151] In the same report the Committee noted in relation to its jurisdiction under the Fair Wages legislation that thete were those especially in legal and academic circles, who were looking to the Committee to give an early seties of decisions providing more precise definitions,» of words used in the legislation. This is not the Committee's intention; indeed it appears essential not to limit the necessary flexibility left by the Act's draftsmen». The flexibile approach was not entirely without its problems. In reg. v. CAC ex parte Deltaflow Ltd. (1977] 1 RLR 486 the High Court adopted a view which the CAC had rejected as "formalistic legalism". Words used in a statute, the court said, were to be given their strict legal meaning».

[152] Geoffrey Wilson: Alternatives to Litigation: Recent British Experience, in Les Conciliateurs la Conciliation ed. André Tunc, Economica, Paris 1983. pp. 75-87.

Chapter 6
Settlement of labour disputes in Greece

Since 1830, when Greece became an independent state, many years went by before the country started to industrialise. Industry started to expand in the 1920s and only after World War II economic growth became considerable. Yet, still today, the bigger part of the population is self employed and works in artisan production or agriculture. A considerable percentage of the wage-earners is employed in the public sector.[153] This structure of employment is important in order to understand the relative weakness of trade unions and employers" associations and the slow development of collective bargaining.

The rather hostile relationships between both sides of industry is only gradually being converted into a more constructive working relationship. During the past, Greek Governments often took an interventionistic and authoritarian approach towards industrial relations. The most recent period of authoritarianism was that of the regime following the military *coup* in 1967, which stayed into power until 1974.

The first institution responsible for the settlement of collective labour disputes was established by Decree-Act of 21 April 1926. Through this Act separate conciliation and arbitration committees were established connected S through a two-stage procedure. First a conciliation committee made an attempt to conciliate the disputing parties, either on the request of the parties or on the initiative of the chairperson, usually a labour inspector. If the attempt at conciliation failed, then an arbitration committee became involved automatically.[154]

After World War II, a semi-compulsory system of labour arbitration was established through the Act 3239/1955 and the Decree 186/1969. The 1955 Act not only addressed the issue of dispute settlement. It also laid the main basis for post-war Greek industrial relations, restricting the agenda of collective bargaining and the right to strike and enabling the Government to implement its income policy without much formalities.

The Act provided that where a collective difference arose, either of the disputing parties was allowed to refer the case to an Administrative Arbitration Court.[155] The agencies involved were the Administrative Arbitration Courts, encompassing six Courts of First Instance and a Court of Appeal. These Arbitration Courts had a quadripartite composition. The President was a judge from a regular court, sitting with a representative from the Ministry of Employment, a representative from the trade unions and a representative from the employers. The Court of Appeal was of quintopartite composition. Next to the representatives from the Ministry, top-ranked civil servants, the employers and employees, there was a fifth member, who was to be appointed by the parties.[156]

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[153] N.D. Kritsantonis (1992), Greece: From State Authoritarianism to Modernization, in *Industrial Relations in the New Europe (A.* Femer and R. Hyman eds.), Oxford, p. 601 ff.

[154] ILO (1933), o.c., p. 533.

[155] S. 10 ff., Act 3239I1955. The procedure could not only be started by one of the disputing parties, but also by the Minister of Employment in exceptional cases.

[156] T.B. Koniaris (1990), Greece, in *International Encyclopedia for Labour Law and Industrial Relations (R.* Blanpain ed.), Deventer, p. 184.

The Ministry of Employment, however, was also involved. Within five days after the application for arbitration, a civil servant of the Ministry would "introduce" the dispute and ask the parties to give evidence for their position. The civil servant then made an attempt at conciliation. If this attempt was successful, the report of the "introducer-conciliator" became a guideline for, or even an intrinsic part of the collective agreement between the disputing parties. In the greater Athens area, a second conciliation effort could take place after eight days from the notification of the Erst report.

If conciliation was not successful, the file was sent to the Arbitration Court of First Instance. From that moment, the parties became litigants and bound by the procedural rules governing the arbitration procedure. Decisions of the Arbitration Courts were legally binding and considered as a collective agreement.

Because of the compulsory elements, the system was held to be in violation of the Greek Constitution of 1952 by some authors.[157] Under the auspices of the three party coalition Government of Conservatives, Socialists and Communists, an Act was passed in 1990 constituting "[...] a radical step towards industrial relations modernisation [...]."[158]

This Act No. 1876/1990 explicitly lays down the right for unions and employers to engage in collective bargaining. It replaces the compulsory arbitration system of 1955 by a new voluntary system of mediation and arbitration by an agency independent from the Government. The overall aim of the Act is to reduce authoritarian Government intervention and to promote the social dialogue between both sides of industry at all levels.

The newly created institution is the Organisation of Mediation and Arbitration, which is referred to hereinafter with its Greek initials as OMED.

OMED consists of 50 full-time or part-time mediators, of whom 20 may act as arbitrators.These mediators and arbitrators are recruited by the Board of Directors of OMED. Vacant posts are publicly advertised and filled through a selection procedure. In order to qualify, candidates may not have leading positions with trade unions or employers" associations. Candidates must have a university degree in law or economics and have experience in the area of industrial relations, particularly with collective bargaining and solving collective labour disputes.[159] Mediators and arbitrators are appointed on a three year basis. Their contract may be renewed. A fee is paid to the mediator/arbitrator by OMED for each case dealt with. Fees are higher if the dispute is solved due to the intervention of the mediator/arbitrator.[160]

Mediators/arbitrators exercise a public function, although technically they are not civil servants. They enjoy complete independence in the exercise of their duty. The mediators/arbitrators are subject to a code of conduct.[161] Violation of this code of conduct or the by-laws on OMED constitutes a disciplinary offence.

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[157] T.B. Koniaris (1990), o.c., p. 184.

[158] N.D. Kritsantonis (1992), o.c., p. 620.

[159] S. 4, Regulations governing the status of mediators and arbitrators of the Organisation of Mediation and Arbitration (1991).

[160] S. 9, Regulations governing the status of mediators and arbitrators of the Organisation of Mediation and Arbitration (1991).

[161] The rules of the code of conduct are incorporated under s. 5 of the Regulations governing the status of mediators and arbitrators of the Organisation of Mediation and Arbitration (1991).

The procedure before OMED starts upon the joint request of the parties. The parties first select a mediator from the list provided by OMED. If they do not agree, a mediator is selected through the drawing of lots. It is for the mediator to decide holding joint or separate meetings and to ask for expert opinions. An interesting combination of conciliation and mediation becomes manifest in the provision, that the mediator has the right to submit his own proposal to the parties, but only if the parties cannot reach agreement within 20 calendar days after the procedure has started. If the proposal of the mediator is accepted by the parties, it has a status tantamount to a collective agreement. It is, therefore, necessary that the disputing parties who come to OMED have the capacity to sign such agreements. If mediation fails, the dispute can be referred to arbitration. The parties decide on the terms of reference.[162] The arbitral decision is taken within ten days and has a status equivalent to a collective agreement.

The cautiously framed demarcation between conciliation and mediation, the requirements for intending mediators/arbitrators and the code of conduct all indicate that OMED is aware of its vulnerability as well as its potential in the emerging modern industrial relations system of Greece.[163]

The Greek settlement of individual labour disputes goes back to the Code of Civil Procedure of 1834 entrusting the settlement of disputes between masters and servants to the Justice of the Peace, an institution modelled after the French *Juge de Paix.* An Act promulgated in 1912 aimed to make the procedure before the Justice of the Peace speedier and more accessible.[164] In 1944, the jurisdiction in individual employment disputes was shifted to the specialised labour judges, sitting alone within the regular court of first instance.[165]

On 16 September 1968, a new Code of Civil Procedure entered into force. This code treats disputes over individual employment rights as a special procedure. The competence to deal with these disputes is divided between the Justice of the Peace and the court of first instance, depending on the amount in controversy. A plan for a system of compulsory conciliation preceding a court procedure was withdrawn.[166]

The law of Civil Procedure stipulates that individual disputes are handled in an informal, expedient manner, allowing for consolidation with other individual claims arising from the same legal cause, and allowing the judge freedom in evaluating evidence. The length of the trial may not exceed eight days. As a first step, the court should try to reach an amicable settlement of the dispute.[167]

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[162] M. Daskalakis (1993), An institutional innovation *in Greece: the new model of mediation and arbitration* in *the collective labour disputes,* Athens.

[163] D. Daskalakis (1993), o.c., p. 4.

[164] Act No. 3974/1912.

[165] Act No. 1968/1944.

[166] M.T. Mitsou (1978), *Le role des tribunaux dans l'administration de la justice en droit du travail,* 19th International Conference of Labour Law and Social Security, München.

[167] T.B. Koniaris (1990), o.c., p. 119. – Annie de Roo and Rob Jagtenberg: Settling labour disputes in Europe, Kluwer, 1994. pp. 341-344.

Conclusion

It is impossible to conclude this brief survey with a detailed comparative analysis. Only some striking differences and similarities are touched upon.

It is noteworthy that the political and economic development of many of the countries studied in this Chapter lacked continuity and stability, unlike in Great Britain, and Belgium. In Germany, Italy, Spain and Portugal national corporatist associations dominated industrial relations in the late 1920s, following the rise of political dictatorship. As a result, voluntary conciliation and arbitration procedures were reformed into compulsory procedures, supervised by the state authorities. In Spain and Portugal this situation continued to exist for a number of decades.

Denmark and Sweden stands out as a noteworthy exception to this pattern of discontinuity. Industrial relations in this country have been firmly settled long ago. Today, the high degree of self-regulation and voluntariness, combined with a high degree of institutionalised procedures is the major characteristic of the Danish and Swedish system. The German system, despite its different historical antecedents, bears resemblance with the Danish system. Here self-regulation has also become predominant and the dispute resolution procedures are highly institutionalised. Another similarity between Germany and Denmark is the systematic distinction between collective disputes over interests and collective disputes over rights. They are handled through different procedures. In this respect, Italy seems to join its northern neighbours. Yet, there are more similarities between France and Italy. Both France and Italy have a strongly individual approach towards labour relations. As in France, the settlement procedures for such individual disputes have received much attention from the legislator. Collective disputes, in Italy as in France, are mainly settled through informal, *ad hoc* procedures involving politicians increasingly. The relations between employers' associations and trade unions are usually antagonistic and distrustful and self regulation is not much developed.

Spain, Portugal and Greece have in common that new approaches to industrial relations are being explored in the wake of the recent past political changes.

In Spain and Portugal, institutions were developed under the aegis of the corporatist system, whereas in Greece the degree of institutionalisation was low thus far. Attempts to set up new settlement institutions independent from the Government have been common to these countries. It is too premature to assess these new developments.

Luxembourg resembles Belgium with its long lasting distinction between white collar and blue collar workers in individual employment relations, although in Belgium no separate institutions were set up. The conciliation procedure for collective disputes in Luxembourg has encompassed a number of compulsory elements, which are not contested by employers and unions. Finally, Ireland has settlement machinery which resembles the British system. This comes as no surprise considering the long lasting connections between this jurisdiction and Great Britain.[168]

[168] This chapter based mainly on the work of Annie de Roo and Rob Jagtenberg: Settling labour disputes in Europe, Kluwer, 1994. pp. 334-345.

Chapter 7
Settlement of labour disputes in Italy

The first institution in Italy responsible for settling labour disputes were the *Collegi dei Probiviri* (Councils of Prudent Men), established by the Act on the Councils of Prudent Men of 15 June 1893. The *Collegi* were introduced as the result of a recommendation by a Royal Commission investigating the phenomenon of strikes in Italy. The *Collegi* bore a strong resemblance to the French *Conseils de Prud'hommes.* They were similarly organised having a *bureau de conciliation* and *a bureau de jugement.* Their jurisdiction primarily concerned individual labour disputes. There was, however, one striking difference between the *Collegi* and the *Conseils.* Section eight of the Act of 1893 stipulated that the conciliation bureau could be seized handling disputes over wages paid or to be paid in the future and disputes concerning the conclusion of a new collective agreement.[169] Hence the *Collegi dei Probiviri* conciliated individual as well as most collective disputes. The Decree No. 1098 of 31 July 1921 brought about some modifications in the organisation of the *Collegi dei Probiviri* and reconfirmed and extended the competence of the *Collegi* in collective disputes to *controversi* (disputes over the interpretation of existing agreements) and *conflitti* (disputes over the terms to be negotiated for future agreements) generally.

In both categories of disputes, the *Collegi* were given additional competence to give *a giudizio* (a decision or award, indicating a desirable solution), in case conciliation was not successful. Section 20 of the 1921 Decree declared that the parties were legally bound by this *giudizio.*

During the Fascist era, lasting from the early 1930s to 1944, a corporatist system of labour relations was introduced.

After World War II, individual labour disputes over rights were entrusted to the regular civil courts. This was a legacy of the Fascist era, which forbad special courts. The Constitution of 1948 allowed for special sections within the regular courts, but these were not introduced until 1973. Within the regular court system, the *Pretori* (Cantorial Judges with jurisdiction over small claims and petty offences) are responsible to deal with individual labour disputes. For the purpose of civil litigation, collective disputes over rights are not recognised in Italy. These disputes are split into a number of individual claims in order to bring them before the *Pretori.* The reasons for this are various. Collective agreements have no special legal status in Italy. They are regarded as mere gentlemen's agreements. A deeper reason is perhaps the "[...] Italian tradition, which has always been very sensitive to the individual's rights, and opposed to subjecting them to discretionary evaluation by a union representative or any third party".[170] The *Pretori* render judgements alone. Appeal against their decisions can be lodged with the *Tribunale* (Court of First Instance) and subsequently to the *Corte d'Appello* (Court of Appeal).[171]

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[169] ILO (1933), o.c., p. 470.

[170] T. Treu (1987), Italy, in *Comparative Labor Law Journal,* Vol. 9, No. 1, p. 122.

[171] Eventually the *Corte di Cassazione* (Court of Cassation) may be seized. Provisions in a collective agreement are not perceived as legal norms, but rather as the terms of a private contxact. Hence these cannot be reviewed in a cassation procedure. However, the *Corte* di Cassa*zione* could be seized in a different manner by claiming that a norm has been wrongly applied by a lower court in the interpretation of a private contract.

The procedure before the *Pretori* was revised in 1973 by the Act No. L 533, which at the same time provided a statutory basis for extra-judicial conciliation practices. Until 1973, the procedure was governed by the Code of Civil Procedure. On average individual labour procedures took three years to be completed. The Act provided for a speedier, more informal, and accessible procedure. Consequently, the procedure in labour disputes differs significantly from ordinary proceedings. An individual labour dispute may be completed within 60 days. The Act exempted labour disputes from all court fees. The Act also provided for a special section in the *Corte di Cassazione* (Court of Cassation) to hear labour disputes. Apart from these improvements within the court procedure, the Act of 1973 provided a statutory basis for an already existing conciliation procedure, administered by the Labour Offices. Labour Offices are Governmental agencies, staffed with civil servants. They are established in all provinces and are hierarchically subordinate to the national Ministry of Labour. Their tasks include the promotion of employment at provincial and local levels.

Since the 1950s a practice developed for officials of the provincial Labour Offices, including the directors thereof, to conciliate labour disputes. To justify this practice, reference was often made to Act No. D. 520 of 1955 that conferred upon the Labour Offices in vague terms the general task to conciliate in industrial disputes.[172]

The Act of 1973 not only gave a statutory basis to the intervention of the Labour Office in two categories of disputes, that is disputes over rights and individual disputes. It also stipulated that the individual Labour Officers should function as conciliators in a collegiate body on a permanent basis. The Labour Officer presides a commission, consisting of eight members, recruited equally from employers" associations and trade unions. The commissions may be invoked by the individual worker himself or by his union. Consequently, the unions do have *a locus standi* in conciliation procedures. Conciliation agreements are registered by the commissions. If one of the parties fails or refuses to comply with the terms of the conciliated settlement, the non-defaulting party is entitled to obtain an enforcement order from the *Pretori* straightaway upon production of the official document embodying the settlement.

A major innovation introduced by the Act L. 533 was the explicit provision that any waiver or compromise reached before a commission of conciliation cannot be attacked later in a court of law under section 2113 of the Civil Code. This section 2113 states that a worker may not waive his rights. Through the Act of 1973, settlements below the legal norm are now explicitly allowed in Italy. A number of labour law specialists, including Treu, have mixed feelings about this innovation.[173]

The regime for settlement of collective disputes over interests has not changed since World War II. This implies, that individual Labour Officers still conciliate such disputes on an informal basis. Next to this type of conciliation, there is an equally informal conciliation practice, whereby politicians intervene in labour disputes. Treu has compared and contrasted these two informal practices.[174] Treu observes that the two informal systems are used interchangeably and simultaneously. Empirical research revealed that in 50% of disputes, which were in the process of being conciliated by

[172] T. Treu (1989), The role of neutrals in the resolution of interest disputes in Italy, in *Comparative Labor Journal*, Vol. 10, No. 3, p. 378.

[173] T. Teu (1987), o.c., p. 121.

[174] T. Treu (1989), o.c., p. 374 ff.

Labour Officers in Lombardia, Veneto and Emilia, regional politicians also intervened. The intervention of the regional politicians was more appreciated by the parties than the Labour Officers. According to Treu, the regional politicians are becoming more important as mediators, as they are increasingly involved in disputes arising from industrial restructuring and employment reductions. In such matters, the regional Governments obviously take a direct political interest. Often trade unions find it difficult to convey the bad news to their members. They consider it more convenient to involve the regional Government, which may press management to mitigate the implementation of its plans. Subsidies may be provided by the regional Governments to reduce the effects of the restructuring process. Management may find it convenient to accept such reductions in its financial burdens, which may accompany the settlement. Opposition to such settlements under the auspices of regional politicians has come from groups of individual employees who were negatively affected by them. With varying degrees of success, such individual employees have applied to the *Pretori*, trying to transform the collective interest dispute into an individual rights dispute.[175]

Treu also observes that no distinction is drawn between conciliation and mediation. Labour officers, particularly the less experienced ones, however adopt a more passive, "go-between" like approach, whereas politicians tend to be more active, making proposals for a settlement or participating in the dispute as a full-fledged third party.[176]

[175] T. Treu (1989), o.c., p. 381.

[176] Ibid., p. 387. – Annie de Roo and Rob Jagtenberg: Settling labour disputes in Europe, Kluwer, 1994. pp. 332-335.

Chapter 8
Settlement of labour disputes in Ireland

In Ireland, independent from Great Britain since 1921, the development of voluntary, statutory machinery for settling labour disputes started by the British Conciliation Act of 1896 and the Industrial Courts Act of 1919. Consequently, the settlement of labour disputes was restricted to collective labour disputes.[177] As in Great Britain, individual labour disputes were submitted for adjudication to the regular courts of law.

The British Conciliation Act 1896 was replaced by the Irish Industrial Relations Act 1946. This Act established the Labour Court inquiring into trade disputes, registering and changing certain agreements and assisting in the establishment of joint labour committees. Apart from these functions the Labour Court was allowed to practise voluntary conciliation in trade disputes.

The composition of the Labour Court is tri-partite. There is a chairman, three deputy chairmen and six ordinary members. These functionaries are appointed by the Minister for Enterprise and Employment. The six ordinary representative members are recruited from the workers" and employers" organisations. Legal qualifications for performing the task are not required. By amendments of the Industrial Relations Acts of 1969, 1970 and 1990 the functions of the Labour Court changed. One of the changes was the transfer of its conciliation function.[178] Although the conciliation function has been removed, the Labour Court still has a role to play in trade disputes by undertaking investigations resulting in recommendations and by arbitration.

After investigation into a trade dispute, the Labour Court makes a recommendation summarising the arguments of each party and containing the opinion and the terms on which the dispute may be settled. The parties are not bound by it, although they are expected to consider the terms carefully.[179]

Under the Industrial Relations Act 1946 the Labour Court is empowered referring a dispute to arbitration. Arbitration is performed by the Labour Court itself or it may refer the dispute to one or more arbitrators. In many collective agreements clauses are incorporated stating that if there is no agreement on the nomination of the arbitrator, the Labour Court "(...] shall be invited to nominate one [...]".[180] Such an arbitrator must be an expert in industrial relations.

Under the Anti-Discrimination (Pay) Act 1974 and the Employment Equality Act 1977, the Labour Court performs an adjudicatory role.[181] The status of the Labour

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[177] ILO (1933), *Conciliation and Arbitration* in *Industrial* Disputes, Geneva, p. 202.

[178] Another change was the transfer of the Equality Officer Service from the Labour Court to the Labour Relations Commission. In 1977 the Employment Equality Act was promulgated.

[179] Irish Labour Court (1992), *The Labour Court,* Dublin, p. 5.

[180] The Labour Relations Commission (1993), *Institutions in Ireland with responsibility for Labour Dispute Resolution,* Dublin.

[181] Another institution established in 1967 to deal with disputes arising from statutory rights is the Employment Appeals Tribunal. It performs its adjudicatory role under the Redundancy Payment Act 1967, the Minimum Notice and Terms of Employment Act 1973, the Unfair Dismissals Act 1977, the Matemity Protection of Employees (Employers' Insolvency) Act 1984, the Worker Protection Regular Part-time Employees Act 1991 and the Payment of Wages Act 1991.

Court, which is assumed to perform a key role in the Irish labour relations, is characterised as follows:

[...] the Labour Court is not a „court" at all, but rather a body which uses its good offices to persuade and cajole parties in dispute in order to achieve a peaceful settlement. In this function it has been largely successful, in that a large proportion of disputes taken to the Court in any year are resolved either at the conciliation stage or through mediation (called "investigation" in the Court's terminology).[182]

The conciliatory function of the Labour Court has been attributed to the Labour Relations Commission (LRC), which was established under s. 24 of the Industrial Relations Act 1990.[183] The transfer of the conciliatory assignment of the Labour Court to the LRC was the result of the desire to promote conciliation and to make parties aware of their own responsibility for settling their disputes.[184] The removal of the conciliatory task was not received with enthusiasm by the Labour Court since it had always considered it as its main function.

As the ACAS, the LRC is independent from Government. The LRC is composed of a chairperson, a chief executive and six ordinary members. As the members of the Labour Court, they are appointed by the Minister of Enterprise and Employment.

The LRC has the general responsibility for the promotion of good industrial relations strove for by providing a comprehensive range of industrial relations services. This is expressed in its organisation. The Commission encompasses the Industrial Relations Conciliation Service, the Equality Service and the Rights Commissioners Service. Apart from that it assists and advises joint labour committees and joint industrial councils.

Within the Commission the Industrial Relations Conciliation Service is responsible for the performance of the conciliation task. The Commission defines conciliation as follows:

Conciliation is continuation of the negotiation process with the active assistance of an experienced Industrial Relations Officer as a chairman and independent facilitator.[185]

Although the Commission has interventionist powers, it promotes the parties to exhaust local procedures first. While offering its services in settling disputes the parties should refrain from any form of industrial action.[186]

The intervention of the LRC in collective labour disputes starts when any party requests to assign an Industrial Relations Officer for assistance in the settlement of a dispute or on its own motion. The Industrial Relations Officer invites the disputants to attend a conciliation conference or to meet officers of the LRC to discuss the dispute.

The request for assistance in the settlement of the dispute must be accompanied by information concerning the details of the dispute, the number and category of workers involved, a summary of what happened during the earlier settlement procedures and the mention of contact persons. The employers" organisations and trade unions are

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[182] F. von Prondzynski (1992), Ireland: Between Centralism and the Market, in *Industrial Relations in the New Europe*, (A. Femer and R. Hyman eds.), Oxford, p. 76 and 77.

[183] S. 25, Industrial Relations Act 1990.

[184] Department of Labour, *A guide to the Industrial Relations Act 1990*, Dublin.

[185] Brochure of the Labour Relations Commission, Dublin, p. 5.

[186] Ibid., p. 3.

notified of the referral to the Commission. After receiving a request the LRC contacts the other party to ask whether they are prepared to attend a conciliation conference, if so, an Industrial Relations Officer is appointed. After dates are agreed, the parties jointly meet under the chairmanship of the Industrial Relations Officer. Separate meetings may be arranged thereafter. The settlements reached with the assistance of the Industrial Relations Officer have no legal effect. If the parties agree, the dispute may be referred to the Labour Court accompanied by a report containing the course of actions taken to solve the dispute.

The Public Sector in Ireland has its own settlement machinery in which conciliation, mediation and arbitration are practised. The bodies responsible are the General Council and the Departmental Council.[187]

In the Irish industrial relations system methods to settle disputes other than adjudication play an important role, which is emphasised by the newly established Labour Relations Commission.[188]

[187] The Labour Relations Commission (1993), o.c., p. 12.

[188] Annie de Roo and Rob Jagtenberg: Settling labour disputes in Europe, Kluwer, 1994. pp. 319-320.

Chapter 9
Settlement of labour disputes in Luxembourg

The present Grand Duchy of Luxembourg has a complicated constitutional status and history. The most important facts for the purpose of this study are that the territory was occupied by France under Napoleon at the beginning of the century, that the territory became semi-independent from the Netherlands in 1839, and fully independent in 1890.[189]

The first institutions with a responsibility to settle disputes were the *Conseils de Prud'hommes* (Councils of Prudent Men), introduced in 1810, and the *Tribunal Arbitral* (Arbitral Tribunal), introduced by the Act of 31 October 1919 on the contract of service of salaried employees. The working area of both institutions was individual labour disputes. *The Conseils de Prud'hommes* dealt with blue collar workers exclusively and the *Tribunal Arbitral* with white collar workers. This distinction between individual labour disputes involving blue collar and white collar workers has continued to exist in Luxembourg for a longer time than anywhere else in Europe, that is until 1989. The Act of 6 December 1989 on labour jurisdiction finally merged the two jurisdictions and established a single Labour Tribunal competent to hear all cases arising from any employment contract. If the claim exceeds 15,000 Francs, appeal against the decision of the Labour Tribunal may be brought before the Court of Appeal.[190] The Labour Tribunals are composed of one magistrate acting as a chairman and one representative from the employers and employees respectively. The employee-assessor is chosen by the magistrate chairing the Tribunal.[191] The Labour Tribunals adjudicate disputes through a largely written procedure. It is possible for parties to opt for a summary procedure, if certain conditions are satisfied.

In the area of collective labour dispute settlement, the year 1936 marks the establishment of the *Conseil National du Travail* (National Labour Council), a Government committee responsible for arbitrating disputes arising from deadlocked negotiations over collective agreements. in 1945, this institution was replaced by the *Office National de Conciliation* (National Conciliation Office), abbreviated *ONC*. The Decree of 6 October 1945 establishing the *ONC* describes the task of the Office as "[...] to prevent or to settle collective labour conflicts, which are not settled through conciliation otherwise".[192] The *ONC* has to perform its task in close co-operation with the Labour Inspection.[193] Although the *ONC* is often referred to as an equitable institution, its composition is essentially tri-partite. Three representatives from the unions and employer's associations respectively are presided over by the Minister of Labour or his deputy. These are the seven permanent members of the. In each dispute, however, *ad hoc* conciliators from the plant or profession concerned are appointed in addition.

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[189] P. Weber (1961), *Histoire du Grand-Duché de Luxembourg*, Luxembourg.

[190] R, Schintgen (1991), Luxembourg, in *International Encyclopedia for Labour Law and Industrial Relations (R.* Blanpain ed.), Deventer.

[191] R. Schintgen (1991), o.c., p. 149.

[192] S. 6, *Arrêté grand-ducal du 6 octobre* 1945 *ayant pour objet l'institution, tes attributions et te fonetionnemeru d'un Once National de Conciliation.*

[193] S. 7, *Arrêté grand-ducal du 6 octobre 1945.*

All collective labour disputes must be referred to the *ONC.* Strikes called without prior submission of the dispute to the are unlawful.[194] The may step into a dispute on its own motion, if the parties fail to take the initiave. The representatives from both sides of industry discuss the dispute separately and jointly, and may ask the president of the Office to assist the meetings. Settlement proposals are based on an absolute majority. Voting is at the close of a conciliation session or in the course of a session when interim measures are decided. The president has a casting vote.[195] No distinction is made between conciliation and mediation.[196]

Not attending the conciliation session or hindering the parties" representatives is also regarded as unlawful.[197] The conciliated settlement binds the parties to a collective agreement and can be declared erga omnes. Failure to comply with a conciliatory settlement constitutes a penal offence.[198]

The Decree of 1945 stipulates that parties may have recourse to arbitration, if conciliation is not successful. The Decree lays down that such arbitration is to be conducted by an arbitration tribunal composed of a president, appointed by the Government and two arbitrators, each of which represents one side of industry. These representatives are to be appointed by the parties. The Decree further provides that the sends a report of non-conciliation, providing the arbitration tribunal with background materials concerning the dispute.[199]

Instead of using this arbitration procedure of the 1945 Decree, parties to a collective agreement may decide to nominate one or more arbitrators of their own choice in accordance with the Code of Civil Procedure. This possibility is laid down explicitly in the Act of 12 June 1965 on Collective Agreements.[200] In Luxembourg a substantial role, at least on paper, is reserved for arbitration, unlike for example in Belgium.

Finally, mention is made of the role of the Labour Inspectors. Labour Inspectors are placed under the authority of the ministry of Labour. The inspectors ensure application of all regulations on working conditions and protection of the workers. To this end they may supply information and advice to employers and employees, and they may freely enter relevant places and investigate books and personnel. Apart from this task, the Inspection has a general task to prevent and smoothen labour conflicts before referring them to a Labour Tribunal or to the ONC.[201]

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[194] S. 9 and s. 25, *Arrêté grand-ducal du 6 octobre* 1945.

[195] S, 15, *Arrêté grand-ducal du 6 octobre* 1945.

[196] G. Tunsch (1992), Luxembourg, in *Industrial Relations in the New Europe, (A.* Femer and R. Hyman eds.), Oxford, p. 397.

[197] S. *25, Arrêté grand-ducal du 6 octobre 1945.*

[198] S. *26, Arrêté grand-ducal du 6 octobre* 1945.

[199] S. 18, *Arrêté grand-ducal du 6 octobre 1945.*

[200] S. *7, Loi du 12 juin* 1965 *concernant les Conventions Collectives de Travail.*

[201] The structure and functions of the Labour Inspection are laid down in the Act on the Labour Inspection of 4 April 1974. – Annie de Roo and Rob Jagtenberg: Settling labour disputes in Europe, Kluwer, 1994. pp. 330-332.

Chapter 10
Settlement of labour disputes in Portugal

Recently a new institution was established outside the *Direcção Geral das Gondições de Trabalho* (Directorate General for Working Conditions), which is called Instituto de Desenvolvimento e Inspecção, Direcção de Serviços das Delações Professionais (Institute for the Settlement and Inspection of Labour Conditions).

In Portugal, by Act of 14 August 1889, arbitration courts were set up to deal with individual labour disputes. It is said that the arbitration courts resembled the French *Conseils de Prud'hommes.*[202]

Following the effective recognition of trade unions in 1910, an Order was issued on 17 August 1912 allowing trade unions, employers, municipal councils and the arbitration courts to request the installation of *Juntas de Conciliacáo* (Conciliation Boards) in the most important industrial areas. These boards intervened by conciliation on a voluntary basis in collective as well as individual labour disputes.

The *Juntas de Conciliação* were composed of an equal representation of the organisations of employers and employees on the basis of elections. The functions of chairperson and secretary were alternately performed by a representative of the workers and by a representative of the employers. The *Juntas* had to meet at least once a year.

The decisions of the *Juntas* were taken by majority vote, made known to the public and were only morally binding. It is observed that the *Juntas* were not very successful.[203]

Through the Period of Authoritarian Rule, which lasted from 1926 until 1974, the Portuguese labour relations experienced an interventionist Government embracing corporatism. Strikes were prohibited in 1927. Independent trade unions were forbidden since they were considered to be threats to economic stability. Wages and labour conditions were determined by the Government predominantly.[204] Nevertheless, conciliation and mediation services were established.

At present individual labour disputes, which are mostly disputes over rights, are settled by labour courts and are untied from the collective industrial relations.[205]

Until 1985 an individual labour dispute could not be referred to a labour court before an attempt at conciliation was made. Such conciliation in individual labour disputes was performed by the Conciliation and Judgement Committees, which were set up in the framework of collective agreements in the branches of industry covered by it. Their ancestors were the Corporate Committees, which were established under the Decree-Act of 23 September 1943 of which it is said that they again were founded on the Juntas *de Conciliação* of 1889.

The Conciliation and Judgement Committees were composed of three members. The chairperson was appointed by the Minister of Labour, the two other members were

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[202] This is suggested by M.J. Leitáo (1993), *Prevention and Settlement of Labour Disputes in Portugal,* Division of Collective Labour Regulation of the Ministry of Employment and Social Security, Lisbon, p. 22. According to the do study of 1933 these arbitration occasionally intervened in „special" collective labour disputes.

[203] ILO (1933), o.c., p. 525 ff.

[204] J. Barreto (1992), Portugal: Industrial Relations Under Democracy, in *Industrial Relations* in *the New Europe, (A.* Ferner and R. Hyman eds.), Oxford.

[205] The labour courts were established by Act 82 of 6 December 1977.

appointed by the signatories of the collective agreement. The settlements reached by conciliation had the same status as a judgement rendered by a court.

Other institutions with a conciliation power in individual labour disputes were the Services of Conciliation of the Ministry of Employment and Social Security. They functioned between 1978 and 1991. Their intervention was voluntary and informal.

At the collective level disputes over interests, as the result of the conclusion or renewal of collective agreements, are mostly settled by the negotiating parties themselves. If no settlement is reached, the parties may request the intervention of a third party, for example a conciliator. The conciliators are regional based and are embodied in the Direction General of Labour Relations of the Ministry of Employment and Social Security. They may be assisted, whenever necessary, by other Ministries responsible for a particular industry.

Conciliation in disputes related to the negotiation of collective agreements was first introduced by the corporatist Decree-Act of 28 August 1969. Conciliation is regarded as an aid to the actual negotiation process. The conciliator is regarded as the helping hand in reaching the collective agreement.

The conciliator may intervene with the consent of both parties or on the request of one of the parties. In the latter case the other party must be informed within eight days and in writing.[206] The conciliator usually calls for joint meetings. If necessary, separate meetings are convoked.

In Portugal mediation was first established by Decree-Act of 28 February 1976. As conciliation it is regarded as an aid to the negotiation process. A difference, however, is that the mediator makes proposals to be freely accepted by the parties. This definition is similar to the British definition of mediation. It is clearly distinguished from conciliation. The outcome of mediation is just as conciliation embodied in the collective agreement.

The Decree-Act of 1976 may be regarded as supplementary. If the collective agreement does not contain mediation terms, the provisions in the law is applicable. Mediation is hardly opted for.[207]

By Decree-Act of 1979 arbitration is provided under sections 34 and 35. Arbitration is performed by three arbitrators. Two are selected by the respective parties. The latter appoint the third arbitrator. When opting for arbitration the parties oblige themselves to accept the award. Compulsory arbitration is accepted since 1976 and was practised in public or state-owned enterprises only until 1992. Since 1992 compulsory arbitration is extended to the private sector in disputes where conciliation and mediation have failed.

From the early days of the Portuguese labour relations the methods other than adjudication are practised in individual as well as in collective labour disputes.[208]

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[206] S. 31, par. 1, Decree-Act of 1979.

[207] M.J. Leitáo (1993), o.c., p. 9.

[208] Annie de Roo and Rob Jagtenberg: Settling labour disputes in Europe, Kluwer, 1994. pp. 335-338.

Chapter 11
Settlement of labour disputes in Spain

Spanish machinery for settling disputes was first introduced by Act of 19 May 1908.[209] The institutions established were the *Consejos de Conciliación y Arbitraje Industrial* (Industrial Councils of Conciliation and Arbitration). The Act prescribed that strikes and lock-outs had to be preceded by an attempt at conciliation. Individual employers and employees, contemplating strikes or lock-outs were under the duty to indicate to each other by formal notice whether they were interested to make an attempt at settling the dispute amicably. If the parties agreed to attempt conciliation, the local Government called a meeting of these *Consejos de Conciliación y Arbitraje Industrial,* composed of three members of the employers and three from the workers. The *Consejos de Conciliación y Arbitraje Industrial,* while conciliating, tried to keep the parties from striking or locking out. If a settlement was reached, it was signed by the parties or their representatives and by the *Consejo.* The fact that trade unions were not represented in the *Consejos* was considered as a week point.[210] Trade unions were given legal personality and were only recognised by Decrees of 10 august 1916 and 25 August 1923. As a result of these Decrees permanent or *ad hoc* joint committees were set up for the prevention and resolution of labour disputes.[211]

Also the Decree of 25 August 1923, recognising trade unions, provided for the establishment of joint labour committees on an *ad hoc* basis.

After 1923, during the regime of Primo de Rivera, the involvement of the Government in labour relations strongly increased. The Government started controlling based on "[...] paternalist supervision for employees" welfare."[212] Spain experienced regimes of an authoritarian, corporatist nature until 1975.[213]

By Act of 27 November 1931 three types of corporative committees were established, of which the committees for labour in industrial and rural employment were particularly charged with labour matters.[214] These committees, established by the Minister of Labour and Social Welfare, were composed of an equal number of employers and workers and assigned with a conciliation and arbitration function. Apart from the members there were a chairperson and a secretary.

The parties or one of the parties could ask for the intervention of these committees, which could intervene themselves in case of disputes of major importance. Usually the dispute was first handled by a subcommittee. If not successful, the full committee could make a fresh attempt at conciliation. Another failure could imply that the Ministry of Labour and Social Welfare asked the parties to refer their dispute to the Labour Council within five days or that the committees advised the parties to opt for arbitration. If the parties accepted arbitration, the parties were obliged to accept the award. Compulsory arbitration was frequently practised. If arbitration was refused, the

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[209] ILO (1933), o.c., p. 460 ff.

[210] ILO (1933), o.c., p. 463.

[211] By Royal Decree of 5 October 1922 such committees could be established.

[212] M. Martinez Lucio (1992), Spain: Constructing Institutions and Actors in a Context of Change, in Industrial Relations in *the New Europe, (A.* Ferner and R. Hyman eds.), Oxford, p. 482 ff.

[213] The regime of Primo de Rivera encompassed the years 1923 until 1930. A climax of the authoritarian regime was reached during the era of Franco, lasting from 1939 until 1975.

[214] The other two were the committees for rural property and agricultural production and industries.

committees would draw up a report which had to be sent to the Minister, containing the essence of the dispute and the proposals for settlement. He could decide to publish it. After the era of Franco the labour relations were gradually relieved of corporatism.

At present the individual and collective labour relations are increasingly shaped by terms in collective agreements. The settlement of labour disputes is characterised by separate procedures for individual and collective disputes over rights and collective disputes over interests.

The settlement of individual disputes over rights, disputes arising from the contract of employment, is mainly entrusted to a highly developed and popular system of labour courts, which has been characterised as "[...] one of the fastest and most efficient, reliable, and economical methods of dispute resolution in Spain".[215] Next to the labour courts there are administrative procedures and procedures as laid down in collective agreements.

The Spanish labour court system encompasses a court of first instance *Magistratura de Trabajo* (Labour Court), a court of appeal *Tribunal Central v de Trabajo* (Central Labour Court) and the Sala *de lo Social del Tribunal Supremo* (Social Chamber of the Supreme Court). They are governed by the Act of 1 July 1985.

Before submitting a dispute to a labour court, a pre-trial mandatory conciliation procedure is required. This conciliation procedure relieves the workload of the labour courts considerably.[216] If conciliation fails the same labour court judge hears the labour suit.

Conciliation in individual disputes is also practised by the Ministry of Labour. This conciliation function was taken over from a special Institute for Mediation, Arbitration and Conciliation (IMAC), which was established in 1979. This Institute disappeared, since the private sector had no confidence in Government based procedures.[217] This Institute also encompassed an Arbitration Court, comprised of a President from the civil servant and one representative from the employers and the employees dealing with individual as well as collective labour disputes. This Arbitration Court began to operate by 1988.

The settlement of collective disputes over rights may take place by the labour courts, informal channels of the parties concerned, works committees, regional administrative bodies, the labour inspectors and the Directors General of Labour of the Ministry of Labour. Most collective disputes over rights are settled through the labour inspectors or the labour courts.

During the hearing, the Director General of Labour tries to conciliate and mediate the dispute. If no agreement is reached, the proceedings may be continued. The Director General of Labour may send the report of the dispute to the labour court. The labour court arranges a new hearing and decides the case quickly. Frequently a series of individual disputes amount into a collective dispute although they tend to be treated as individual ones in law.

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[215] C. De Miguel Y Alonso (1978), Special Courts, in *Access to Justice, (M.* Cappelletti and B. Garth eds.), Alphen aan den Rijn, p. 860 ff.

[216] C. De Miguel Y Alonso (1978), o.c., p. 865 ff.

[217] R. G. McElrath (1989), *Trade Unions and the Industrial Relations* Climate in Spain, Philadelphia, p. 178.

Conciliation, mediation and arbitration may be practised in the resolution of collective labour disputes over interests, if solutions cannot be reached through bilateral negotiations. Such negotiations are taking place, directly or indirectly through the works centre councils or the *Comisión del Convenio* (Committee of the Agreement). Such an institution is usually established by a collective agreement and is responsible for the settlement of disputes arising from the application of the agreement.

In Spain conciliation and mediation are distinguished. Unlike the British ACAS officers, however, a Spanish conciliator may also mediate and *vice versa.*

Conciliation or mediation in collective labour disputes over interests is formally performed by the labour inspector, and by the Director General of Labour. Conciliation or mediation may be required for at any time during the negotiations. The conciliator or mediator is designated by the negotiating parties.

Private arbitration, agreed upon by the parties themselves in an arbitration clause is hardly practised in Spain. Public arbitration, that is arbitration provided by an institution designated by the Labour Law Code, does exist but to a limited extent. The existing procedure before the Director General of Labour which used to have a compulsory character was declared unconstitutional in 1981 by the Constitutional Court. This procedure, however, may still be used on a voluntary basis. The Labour Law Code states that employees cannot strike, if they have initiated the procedure. If the employer initiates the procedure, the employees may go on strike. Then the procedure is suspended. The Labour Law Code gives detailed rules of procedure for this public arbitration procedure.

In Spain machinery for settling labour disputes through other means than adjudication has been there since the dawning of the development of its labour relations system. Even during the authoritarian regimes there was some settlement machinery such as compulsory arbitration. At present the mandatory conciliation procedure of the labour courts seems to be very successful because of their speedy character.[218]

[218] Annie de Roo and Rob Jagtenberg: Settling labour disputes in Europe, Kluwer, 1994. pp. 338-341.

Chapter 12
Settlement of disputes out of court in Sweden

1. Negotiations

In general there are very few rules concerning negotiations between private parties as a means of solving disputes in Swedish legislation. However, it is obvious that the risks involved in litigation, particularly with regard to costs for litigation, will serve as a strong incentive to settle out of court.

Negotiations are conducted by lawyers as a normal part of the preparations for litigation. The preparations for litigation may indeed be seen as continuing negotiations, possibly ending in the judge's trying to reconcile the parties.

In areas where organisations bargain collectively, negotiations as a method of settling disputes has, however, been made subject to statutory regulation. Negotiations with a view to solving disputes between individuals should be regarded as an integral part of collective bargaining systems.

In Sweden there are mainly two areas where there is regular collective bargaining, namely in labour relations and in landlord and tenant relations. This chapter shall deal with labour law negotiations, which is the most advanced system.

The negotiation procedures in labour relations are intended primarily for disputes concerning the collective agreement.[219] Here the interests of the collective parties dominate, although there may also be individual interests present concerning the rights of an individual employee under the agreement. I shall not elaborate on the rules as to who „owns" the grievance[220] – the individual employer or employee or the organisations, which may be present on either side. We shall only point to the fact that there are two main rules which are of interest. When a dispute concerns a right under a collective agreement, the parties to the agreement may of course always solve the dispute by amending the agreement. Such an amendment is, however, not binding on the individual member to the extent that the concerns rights already acquired under the agreement, e.g. payment already earned. The collective parties may also between themselves agree on the construction of the agreement. This does not involve amending the agreement. Such an agreement is only binding on the individual member insofar as it is in accordance with the original and common intent of the parties. The individual is not bound by agreements on the interpretation of the agreement made later on by the parties diverging from the original intent and meaning of the agreement.

When a dispute concerns a right under an individual contract of employment, naturally the individual himself „owns" the grievance and the organisations may in no way settle the dispute without the consent of the individual. The collective parties may however settle the dispute with regard to the future by making a collective agreement. It is possible according to the Swedish Act on Joint Regulation of Working Life to

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[219] See, in general, Schmidt, *Law and Industrial Relations in Sweden*, 1977, pp.101 ff.

[220] Cf. Schmidt in Aaron (ed.), *Labour Courts and Grievance Settlements in Western Europe*, 1971, pp.188 ff. Cf. also Schmidt, *Law and Industrial Relations in Sweden*, pp. 55 ff.

make collective agreements also concerning individuals, but this possibility is seldom used.

Negotiations in grievances over a collective agreement may to some extent be regarded as a way of preparing the dispute before bringing it to the Labour Court. Since the Swedish Labour Court is a court of last instance. it is necessary that the suits are well prepared. In consequence the Act of Labour Disputes requires the collective parties to negotiate over the matter before bringing the dispute to the Labour Court. In effect a very minor part of all grievances are brought before the Labour Court, most of them being solved in local or central negotiations.

Naturally the organisations look upon the risks of bringing a dispute before the Labour Court in much the same way as do individuals. The risks involved in losing the case as well as the costs for litigation are taken into consideration. However, these matters partly take on new dimensions on the collective level. Probably the financial aspect of losing the case and having to pay the costs of litigation for the other side as well play a lesser role. More important is the impact of the judgement in the future relationship of the parties. A favourable judgement is regarded as a valuable asset, whereas an unfavourable judgement may be very difficult to compensate for, e.g. by amending the collective agreement. The Labour Court bases its activity to a great extent on precedents.[221] A judgement may therefore have repercussions on a great number of similar or connected cases. Therefore the parties often prefer *ad hoc* settlements rather than going to court. The parties often make this entirely clear by stating in the settlement that the settlement is *ad hoc* and may not be referred to in future disputes between the parties.[222]

The long-term relationship between the parties also plays a significant role in grievance processing. Good relations is an asset for both parties which is not jeopardised in grievances of minor importance. In some instances, particularly in local negotiations, grievances are subject to barter. Concessions are made in one grievance in exchange for favourable terms in another grievance, or even in collective bargaining.

One may therefore say that in collective relationships grievances are subject to a more complicated game than elsewhere.[223] The interests of the parties are not confined to the particular grievance in question. The parties often have common interests that go beyond that, which also contributes in making settlements in most cases possible. The complexity of interests of the parties also applies in negotiations over individual disputes, although perhaps to a somewhat lesser degree. In particular when the dispute concerns statutory rights of individuals, e.g. employment protection, the disposition of the labour side to settle on a compromise is certainly less than in disputes concerning the own collective agreement. Apart from the fact that the trade union in many cases cannot dispose of the rights of the individual, there are psychological reasons involved. One may say that the parties adopt a more legalistic way of looking upon the matter

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[221] Sigeman, „Ascertainment of Law and Doctrine of Precedent in the Swedish Labour Court", 22 *Sc.St.L* (1978), pp. 179 ff. Cf. Schmidt, *Law and Industrial Relations* in *Sweden*, pp. 231 ff.

[222] Cf. Edlund, „Settlement through Negotiation of Disputes on the Application of Collective Agreements", 12 Sc.St.L. (1968), p. 37.

[223] Edlund, *op. cit.*, pp. 41 f.

when the dispute concerns legislation which has not been bargained by the parties like a collective agreement.

According to Swedish law the union has a right to negotiate over any grievance arising out of a collective agreement or any individual contract of employment as long as the matter concerns a member of the organisation.[224] According to sec. 10 of the Act on Joint Regulation of Working Life, an organisation of employees shall have a right to negotiate with an employer on any matter relating to the relationship between the employer and any member of the organisation who is or has been employed by the employer. An employer shall have a corresponding right to negotiate with an organisation of employees.

The individual employee, however, has no right whatsoever to negotiate. He/she must rely on the organisation to take on his/her grievance. The individual does not even have a right to be present in such negotiations. However, as noted earlier, any settlement must be agreed on by him. According to most collective agreements negotiations are conducted first locally, i.e. on the enterprise level, and secondly, if either party so requests, centrally, i.e. between the central union and the employer and the employer's association. In some cases procedural agreements establish a more complex system with several different steps of negotiations at the enterprise level and also with possibilities for the parties to refer the matter to some body for joint recommendations. If either side decides to bring the grievance to the Labour Court, the negotiation procedure must be completed according to the collective procedural agreement unless the parties jointly decide to end the negotiations on a lower level.

There is no way an individual can prevent the union from negotiating over his/her grievance – the union may have vested interests of its own in the matter – although he/she cannot be forced to settle on the result of the negotiations. Instead the individual may decide to bring the matter to court. It is presumed in the Act on Labour Disputes that the union will represent its member.[225] We shall not go into the matter what happens if the union decides not to, or if the individual does not want to be represented by the union.

Grievances concerning individual employment contracts are to be brought before the Labour Court in the first instance if the individual is a member of the union and if there is a collective agreement in force at his/her place of work. If this is not the case, the grievance has to be brought before a district court. Appeal is to be made to the Labour Court.

A crucial point is of course to what extent the union is under an obligation to negotiate with regard to an individual grievance. The matter to what extent the union is obliged to help its members is not entirely clear. However, as a rule of the thumb one may say that the individual is entitled to the support of the union in local negotiations. Any further commitment from the side of the union depends on how the union looks upon the prospects for success. The union will of course also give legal aid to its members, e.g. in court, if it finds litigation justified.

It is an open question to what extent legislative intervention may facilitate settling out of court in collective negotiations. There is indeed under Swedish law in

[224] Schmidt, *Law and Industrial Relations in Sweden*, pp.103 f.
[225] Cf. Schmidt, *Law and Industrial Relations in Sweden*, pp. 55 ff.

negotiations over rights as in all kinds of collective bargaining a duty to bargain in good faith. The duty to bargain does not, however, include any duty to make concessions or to make any agreement. The duty to bargain can rather be seen as a duty to discuss the matter with the other side openly and fairly.[226] This means that the party who is under a duty to negotiate has to answer the demands of the other side, to state his/her reasons for his/her position and to give the information requested by the other side. It would, however, in my view be very difficult to introduce a duty to make concessions, not to hold unreasonable positions, etc., in disputes over rights, however feasible this may be in bargaining over a new collective agreement.

To some extent promotion of out of court settlement in disputes over individual rights might be the result of encouraging the union to take on such disputes. One may also suspect that if the bargaining position of the union is improved it will be easier for the parties to work out settlement. From a formal point of view the position of the union in such disputes is not stronger than that of the individual member that it represents, although in effect the union is of course stronger. The strength of the union to some extent depends on good relations with the employer. Where the relations are not as good as they should be, a strengthening of the negotiating position of the union may seem appropriate.

However, one should also remember that as legislative intervention becomes more sophisticated it also becomes more difficult for the parties to understand and to use, particularly on the local level. The present author submits that rules in order to be effective should also be simple, easy to understand and to use.

In some respects the Swedish legislation does encourage trade unions to take on disputes concerning the rights of individuals. The primary concern of legislation here is not, however, to promote a settlement out of court, but to promote a speedy settlement of disputes and at the same time strengthen the position of the union in negotiations. The Act on Joint Regulation in Working Life contains rules as to the prerogative of interpretation in two important respects that both concern rights of individuals.

According to sec. 34 of the Act, where a dispute arises between a union and an employer over a member's duty under an agreement to perform work, the union's view of the interpretation of the agreement shall apply until the dispute has been finally tried. This also applies if the dispute concerns the duty to perform work according to an individual contract of employment. The view of the employer shall, however, apply if there, according to his/her opinion, exist urgent reasons against a postponement of the disputed work. Urgent reasons may be the risk of a great economic loss or danger of physical damage to goods and, of course, physical harm.

According to sec. 35 of the Act, the employer must immediately call for negotiations if a dispute arises with the union concerning wages or other remuneration for a member of the organisation. This also applies to an individual contract of employment. If the negotiations do not lead to settlement of the dispute at the local level the employer has to call for negotiations on the central level and, eventually, bring an action before the Labour Court. If he fails to do this within the time limits stipulated in the statute, he/she is obliged, as far as relates to the disputed amount, to

[226] Cf. Schmidt, *Law and Industrial Relations in Sweden*, p. 120.

pay remuneration which accords with the interpretation of the union, so long as the demand is not unreasonable. – Here it is obvious that the legislation uses another technique than in sec. 34. In disputes concerning the duty to perform work according to most systems of labour law, the opinion of the employer will prevail pending trial. This may be regarded as a corollary to the right of the employer to give reasonable orders – one of the employer prerogatives. By reversing the prerogative of interpretation the position of the union seems to be strengthened considerably. As soon as the union declares that it has another opinion than the employer concerning the interpretation of the agreement, the employer may no longer order the employee to perform the disputed work. However, the union is Liable for damages if it uses its prerogative of interpretation in bad faith, i.e. when the union understands or should understand that its interpretation is wrong. In order to reach a solution of the dispute the employer has to call for negotiations and eventually bring an action before the Labour Court.

In disputes over pay the procedure is different. Here the employer does not have to comply with the opinion of the union. However, he/she has to carry the burden of litigation as opposed to claims in general where the claimant has to bring an action against the debtor.

It may seem obvious that these rules are highly efficient in promoting a speedy settlement of disputes. It may also seem likely that the rules are efficient in bringing individual disputes into the negotiation procedure and that thereby settlement out of court is promoted. The fact that the employer will carry the procedural burden does not in itself alter the character of collective negotiations, although it has been argued that the legislative intervention giving the union the prerogative of interpretation will bring in an element of prestige into the negotiations, thus making settlements more difficult to reach.

As a matter of fact very little is known about how these rules actually are used. It seems, however, that these rules are not used to the extent that was expected when the Act came into force. Contrary to expectations there are only a handful of cases concerning these rules from the Labour Court. In a study conducted at the Swedish Centre for Working Life (Arbetslivscentrum) involving close on 1,000 cases of negotiations only two cases on these rules have been reported. One case concerned a situation which clearly revealed that both parties had grossly misunderstood the rules. In the other case one of the researchers had told the union representative that the rules of priority of interpretation applied. The union representative had failed to see that, during discussions concerning pay for one particular employee, a dispute had arisen in the sense of the Act. The employer had failed to realise as well that he/she then had to call for negotiations.

Therefore it may tentatively be concluded that the rules on the prerogative of interpretation are inefficient because the parties on the local level do not understand them. The main difficulty seems to be to identify the situation where the rules come into operation.

2. Recommendations and quasi judicial proceedings

In some instances a matter may or has to be referred to an impartial body that will issue a recommendation.

Disputes in connection with inventions made by employees may on the request of the employer or the employee be referred to the Council of Employee Inventions, a government funded body consisting of two employer and two employee representatives, an impartial chairman and two other members one of whom is an expert in matters of patents. The council will issue a statement concerning the dispute. If either party has brought an action in the matter to court, the court may also request a statement from the council.

3. Concluding remarks

In this paper we have tried to make a short survey of some of the systems used in Sweden to promote employment related settlement of disputes out of court.

The conclusions that can be made are not very encouraging with regard to settlement out of court in general. The problem may in general terms be described as one of the relationships between the quality and the costs of justice, but these parameters vary in various sectors of society, depending on the parties, the issue and the kind of conflict.

A settlement in a dispute involves a number of complex factors. Eventually, if the parties fail to reach an agreement, the „right" solution has to be established and it will be forced on one of the parties, or both. The essence of court procedures is that the solution is binding on the parties and that it can, and will, be enforced. However, one may safely say that in a great many cases the element of force or judicial sanctions is unnecessary. The parties are willing to accept a solution proposed by a body in which they have confidence. In effect they need a referee, not a judge. At least in some disputes this is probably the case in labour relations in Sweden and it is probably also the case in relationships involving business enterprises of some size. The continuing relationship between such parties involves social sanctions against anyone who breaks the rules of the game, sanctions which probably are more serious than the sanctions applied by a court.

Therefore, under such circumstances, out of court settlement is rather easy to reach by means of recommendations issued by impartial bodies.

Again, it may be said that under such circumstances the body making the recommendation might often as well be a court. The advantage of a system of out of court settlement based on recommendations over a system of litigation depends on whether the procedure for settlement is superior to court procedures. The decisive factors are probably speed and costs as well as the prestige of the body making the recommendation compared with the prestige of a court.

There are reasons to believe that the Swedish Labour Court, where the procedure is reasonably quick, somewhat more informal than before a regular district court and where in many instances the parties carry their own costs, in combination with the fact that the court enjoys a high prestige, explains why the parties in the labour market

have not chosen a system of recommendations on top of their own negotiations procedure. True, there are a number of bodies jointly set up by the parties in order to make recommendations concerning the making of collective agreements, but the Swedish Labour Court does not have jurisdiction in such cases. It may also be noted that arbitration plays a rather insignificant role in Swedish labour market relations. It seems that a court system which fulfils the requirements may even compete with a system of negotiations, at least as far as disputes over rights are concerned. In most cases, even where the parties in effect do not need a court, negotiations between the parties are highly efficient in bringing about a settlement.

Negotiations, particularly in the labour market, however, include a strong element of persuasion. The union often tries to persuade the employer not to stand on his/her rights in a dispute with an individual. The arguments used may vary. The union may call for equity, or even mercy, the union may threaten to impose informal sanctions, etc. The long-term relationship of the collective parties often play a decisive role. One may not, however, take for granted that the argument of good long-term relations is always used by the union alone. It may work both ways. If the employer takes a firm stand in an issue, the union may choose to drop the case for the sake of good relations in the hope that there is still a chance of making advantageous settlements in the future.

A system of negotiations between lawyers representing their clients works very well in most cases. Since this is the most widespread system for the promotion of settlements out of court, I submit that any general proposals for increasing the will of the parties to settle their disputes amicably have to start from this system. An improvement of this system could be achieved if legal aid was extended so as to embrace a still larger section of the population. As noted before, legal aid is also given as a home insurance benefit, which in part gives the same result. Information as a part of legal aid would also have to be subsidised. As a part of the legal aid system, or even as a generally applicable rule, a further promotion of settlements could be achieved if a statutory rule of compulsory negotiations were to be introduced. Negotiations between the parties with a view toward settlement would be a precondition for bringing an action before a court. In this way there would be a reasonable guarantee that the parties, preferably represented by counsel, actually have met. The duty to negotiate would force the parties seriously to discuss the matter.[227]

[227] Hein Kötz and Reynald Ottenhof: Les Conciliateurs la Conciliation, Une etude comparative, Economica, Paris, 1983 pp. 140-155.

PART TWO
Alternative Dispute Resolution System in Hungary

I. Historical development of Dispute Resolution schemes in Hungary

There are some alternative methods for settling disputes in the Hungarian history. They mainly are not special Hungarian legal institutions, but during the last centuries they well settled into the Hungarian dispute resolution system. Some of them can be seen as an early forerunner of the Alternative Dispute Resolution schemes. The most common entities were as follows: *a)* arbitration (arbitrium); *b)* conciliatory boards (békéltetõ bizottságok); *c)* justice of the peace (békebírák) and *d)* conciliation in court (egyességi kísérlet).

1. Arbitration (arbitrium)

The decision of a "quasi" court elected by the parties by general agreement for the settlement of a certain matter in dispute.

These judges of arbitration were called arbiters in Roman legal sources. This term was encountered in several senses, the arbiter could be a judge elected by the parties by a special agreement (compromissum) to whom their case was referred [arbiter receptus] or a referee appointed officially by the magistrate [arbitrium/judex]. These were used among others in cases which did not involve the judicial decision on a certain legal dispute but rather giving opinion about a certain situation, or when mediation was necessary in order to avoid legal disputes.

They had a similar role in Hungary, too, and were highly respected as early as from the beginning of the age of the Árpáds. Arbiters were already encountered during the reign of Saint Stephen (Book II, Chapter 16), their task was to carry out a role of mediation and conciliation in cases of murder.

It is known from the "Váradi Regestrum" as well as from several later documents that in disputed matters the Hungarian juridical procedure allowed each party to choose two honest persons from among their relatives and neighbours, who were always the advocates of a peaceful solution. The parties subjected their disputed matter to their decision. Their award appeared later as "Arbitrium boni viri or probi viri", and in most of the cases it put an end to the dispute.

These men – who were also called "caught judges" (fogott bírák) – were frequently asked to act as justices of the peace, the parties usually turned directly to them with their disputed matters. There were village and county arbiters, too, who were entitled to proceed in more significant, legal matters as well, and who, through their greater experience, could also appear in the palatine's court of justice. If the arbiters could not reach an agreement, the parties were referred to the court of competent jurisdiction.

The possibility also existed for the parties to name arbiters in any stage of the lawsuit. In this case the court granted a delay and set the date before which the parties were obliged to appear before their arbiters. However, the "award" passed in this way

became binding only if the parties accepted it as a settlement in ordinary court. If, however, one of the parties did not accept the decision, the lawsuit was continued in an ordinary way.

If the parties took their mutually chosen arbiters with themselves as early as in the first stage of the commencement of the lawsuit, the court – accepting the agreement reached – discontinued the lawsuit. In such cases the lawsuit could not be reopened, and the person who violated the agreement was punished as a quarrelsome, litigious person.

Thus in the Middle Ages judges of arbitration (elected judges, caught judges, arbiters, probi viri) were important participants in legal proceedings both in Hungary and abroad, who always strove to find a peaceful solution for the given matter. They offered great help to the judges by acting out their conciliatory role, and they also played a major part in the juridical procedure.

They could act as mediators both in criminal cases and in decisive tilts. They aimed at terminating them by their proposals for agreement. In other disputed matters or lawsuits the judge also referred the parties to them in the first place.

The arbiter's task was primarily to give sensible opinion, but if the parties turned to him voluntarily with their dispute and subjected themselves to his decision, his opinion was considered as a final judgement and whoever failed to adhere to it was punished, in addition to its execution. If the parties refused to accept his award by common agreement, his role was restricted only to helping to reach the agreement, and the parties were referred to the competent judge.

Thus in this sense arbiters were lay judges, who were not legally qualified and did not belong to an official body. Arbitration was not necessarily based on the strict application of law, as on the fixed day, after hearing the parties and examining the documents, the arbiters could decide at their discretion – with an eye to God and justice – before a provost or a chapter.

Despite these the fact remains that in the rules of court of the Middle Ages arbiters discontinued several lawsuits through their role of conciliation, thus contributing to the undisturbed operation of ordinary courts in the whole county.

Arbiters were similarly common in Transylvania, too. It is characteristic that there was no possibility for the reopening of the case against their award. However, such procedures had a special feature, namely that the arbiter could also proceed as an advocate (procurator) in cases referred to arbitration.

Arbitration is the settlement of a dispute between parties in an organisation set up in agreement with the parties' common will and according to the rules determined by the parties, and as such it serves to supplement ordinary court procedures. The arbiter is authorised by the parties to work as a real judge, so he gains his judicial power by means of the parties' commission. However, he does not represent the parties, so he cannot accept instructions from either party in the course of his proceedings.

Thus the roots of the Hungarian regulations concerning the peaceful settlement of disputes date back to the early Middle Ages. Its first comprehensive regulation, however, is found only in the civil judicial regulation of 1868 (Act LIV of 1868). The peak of the development of this legal institution was reached in Title 17 of the Civil Procedure of 1911 (§ 767-788), which regulated the procedure of arbitration on a European level.

After the Second World War this legal institution started to decay partly because of nationalisation and the solidification of planned economy, and partly because of the establishment of boards of arbitration set up for the resolution of public disputes, and it was looked upon by the literature of law as a legal institution on the verge of extinction. Although the opinion about arbitration changed by the end of the sixties due to the new economic mechanism, the new regulations of the Amendment of Civil Procedure III did not bring any changes of content, either.

The breakthrough came at the end of the 80s. Then the Company Act gave the possibility to domestic natural persons to settle their legal disputes through arbitration.

As regards the establishment of courts of arbitration a distinction has to be made between ad hoc and permanent (organised, institutional) courts of arbitration. The ad hoc court of arbitration is set up for the settlement of a single legal dispute, where the rules of the procedure are also determined by the parties. The institutional court of arbitration is usually associated with a certain organisation (chamber) and has a panel of arbiters and a permanent administrating organ. Its rules of procedure are also set by itself. The number of the arbiters can be agreed upon by the parties as they wish as long as it is an odd number, and if this question is not regulated, the number of the arbiters is three.

2. Conciliatory boards

The settlement of disputes by arbiters was actually a one-man arbitration, which was an excellent way for settling simple disputes in the Middle Ages, and thus it relieved the otherwise cumbersome medieval adjudication from the burden of a great number of trivial cases.

It is true to say that the smaller the sum involved is and the sooner the problem can be solved, the simpler the method for dispute settlement can be. On the other hand, the more complicated a dispute is and the more people are involved in it (e.g. disputes concerning employment relations), the more difficult it is to find a suitable person – preferably trusted by both parties – who is willing to undertake to make a decision. For this very reason usually several persons were involved in conciliation already in the guilds.

So certain institutions resembling conciliatory boards were encountered during the Middle Ages in cases of disagreements between guild-masters and journeymen. These boards, however, set up in the framework of the guild, can in no way be considered as equivalent to the subsequently regulated conciliatory boards as there was neither a legal background nor a definite organisation behind these conciliators, who were constituted by laymen, that is by the members of the guild. However, the practical results, the rapid and permanent settlement of the disputes all acted towards further development and thinking.

It was actually the period of industrialisation, which saw the intensification of social conflicts, during which the rapid, cheap and just settlement of disputes concerning labour contracts became really important. The activity of conciliatory boards in today's sense was legally recognised in Hungary only as from 1872. Act VIII of 1872 made it first possible to establish industrial boards (iparbizottságok) for the

peaceful settlement of conflicts between the employer and the workers. This possibility, however, was legally taken only by the city of Miskolcz, while the other industrial associations (ipartársulat) set up only private conciliatory boards, which became common practice, their decisions were accepted by the parties involved, but the institution lacked legal background.

The task of the boards was on the one hand to set the conditions of the labour contract to be concluded, and on the other hand to create an agreement compulsory for the future in the case of work stoppages. At the same time this was the best means for settling the disputes arising between employers and employees, thus also for preventing work stoppages (strikes).

The board was generally set up from an equal number of representatives by both parties for the purpose of conciliation, and it was presided by a chairman, outside the sphere of interest of both parties, who was either permanent or elected from case to case.

The essence of the board's activity was that its decision, whatever it was, should be recognised by both parties as binding on themselves. It was indispensable to its effective operation that its members should be familiar with the conditions of the employers and the employees and also to be trusted by both parties.

In Hungary it was Act XVII of 1884, that is the industrial act (ipartörvény), which first ordered "to set up a separate conciliatory board consisting of craftsmen and journeymen for the purpose of settling disagreements and disputed matters between craftsmen and apprentices or journeymen in each guild".

Two conciliatory boards are recognised by law: a) *permanent conciliatory boards* and b) *temporary conciliatory boards*. §141 orders the establishment of *permanent conciliatory boards*. This concerns only small-scale industry. Its craftsman members are the members of the corporate magistracy (testületi elöljáróság), its journeyman members are journeymen chosen by the journeymen of the craftsmen belonging to this guild, elected at a meeting convened for this purpose by the industrial commissioner (iparhatósági biztos). This kind of conciliatory board is in fact an industrial court as it serves to settle individual disputes arising from labour contracts in force. Such boards usually worked as boards of conciliation and arbitration (Einigungsfimter) in other European countries with more developed industry and were organised for a district or for several branches of industry. The settlement of disputed matters arising between employers and workers by means of conciliation originated from England at the time of the industrial revolution and spread to other European countries, including Hungary.

In England this task was carried out by the board of arbitration in the framework of the Ruppert Keettle and Mundella systems. The former (Ruppert Keettle's) board was constituted by 6 representatives of each party and by the chairman elected by them, while in the other (Mundella's) system it consisted of 20 members elected by the parties and of the chairman. As the beneficial activity of the boards could be experienced on many occasions, the government promoted the establishment of such boards by passing laws, what is more, a permanent court of arbitration was also set up in 1908 as a supplement to the institution of the justice of the peace. This served as a model for the subsequent organisation of industrial courts across Europe.

In Hungary the task of *permanent conciliatory boards* was first of all to reconcile the parties. If they failed to do so, the members decided by a majority of votes, and in

the case of a tie vote the chairman's vote was decisive. The decisions, if necessary, were executed by the industrial authority (iparhatóság). The party dissatisfied with the decision could enforce his claim in court within 8 days, but this did not hinder execution.

The operation of the boards generally fulfilled the hopes attached to them, only exceptionally did the interested parties request the enforcement of their claim in court. Even if this happened, the justified decisions made by the boards consisting of experts were usually confirmed by the ordinary court, apart from a few exceptions.

The other board is the *temporary conciliatory board* set up by § 163 of the Act. Its task was to intervene in the case of strikes both in small-scale industry and manufacturing industry (to reconcile effectively) and to prevent or to terminate collective disputes aimed at changing the labour contract. The craftsmen and journeymen were represented in equal numbers (6 persons for each party) in the conciliatory board, which was presided by the industrial commissioner. The chairman of the board was the president of the industrial authority of first instance.

In practice, the text of the law could not be realised to a full extent, as there were hardly any examples for such boards in the case of strikes in the field of small-scale industry, while it was almost impossible to set them up in manufacturing industry as manufacturing industry was not organised according to individual branches of industry and thus neither the workers, nor the industrialists could choose their representatives. That is why § 35 of the Act on industrial inspectors[228] (iparfelügyelõkrõl szóló törvény) set forth later that "in case the procedure defined in § 163 of the quoted act fails to be successful, the Minister of Commerce may commission the industrial inspector to set up a conciliatory board and to resolve the arising disagreements peacefully".

However, at this time conciliation in manufacturing industry was not settled in a reassuring way, it was resolved differently from case to case, through either the industrial authorities of first instance or the district industrial inspector. The draft of the new industrial act (1909) hallmarked by the name of József Szterényi, Under-Secretary of Commercial Affairs, intended to regulate the whole matter of conciliation in manufacturing industry in a progressive manner, with the consideration of foreign experiences; this act advocated the establishment of separate industrial and commercial courts for the purpose of conciliation as well as the organisation of a court of arbitration proceeding in disputes encountered in public utility companies. According to the draft the attempt to arbitrate was made compulsory and failing to do so would entail certain legal consequences for the employer.

3. Justices of the peace

The institution of the justice of the peace (German: Friedensrichter, French: juge de paix, Hungarian: békebíró) was made part of the Hungarian judicial system by Act XXII of 1877 on Procedures in minor civil actions. This Act stated that a justice of the peace could proceed in those minor civil actions which were beyond the scope of municipal judging. As regards the person of the justice of the peace, it was prescribed

[228] Act XXVIII of 1893.

by the legal rule that "in towns and villages vested with the power of municipal authority one or more unimpeachable and suitable persons, who have graduated in law or have taken a theoretical judicial or jurisprudence state examination or have held the position of a judge, can be appointed justice of the peace by the Minister of Justice in the name of the King, after the hearing of the committee of public administration".[229]

If a justice of the peace was entrusted with the task of municipal judging, no other municipal judging was permissible in the area of his competence and during his time of operation. Justices of the peace could also proceed – among others – in actions for performing work provided that the value of the object of the action did not exceed the amount defined by law.

This form of the institution of the justice of the peace was unknown everywhere else, but it existed as an administrative authority in England and in France, too. In these countries they proceeded as authorities of conciliation and arbitration, and exercised judicial authority in minor civil actions, in addition to which they were also vested with police and administrative power. The English system of the justice of the peace served as the basis for the French system.

According to the law, a French justice of the peace could only be a person who, through his personal abilities and authority, was capable of settling disputes between local residents. However, the institution could not take root in this form. Instead, French justices of the peace became officials appointed by the government, who - in addition to compulsory conciliation in civil actions - administered justice in minor civil cases, carried out tasks of policeman and criminal judge and participated in extrajudicial cases.[230]

4. Conciliation in court

This is the attempt at the peaceful settlement of a legal dispute in court without a lawsuit. This method is connected to ordinary court but makes it possible for the parties to put an end to their dispute in an alternative way, which is still in use today. Its essence is that if an agreement is reached by the parties before the bringing of the action, it has the force of a judicial agreement, but if they fail to agree, the court – provided both parties have appeared and the case belongs to its competence – places the action on record on the plaintiff's request and the case is heard. The old summary procedure also contained agreement but only for district court cases on the basis of § 21 of Act XVIII of 1893. However, no summons for agreement could be requested as regards tribunal matters.

The usefulness and practicability of this alternative method for settling disputes is confirmed by the fact that the regulations of the Civil Procedure in force still make it

[229] Act XXII of 1877 on Procedures in minor civil actions, § 3.

[230] This is important because Boldizsár Horvát, Minister of Justice, intended to introduce the institution of the justice of the peace in Hungary with a similar power. He submitted his bill to the Parliament on 6th January, 1870, but his proposal was not even debated. According to his bill, justices of the peace could have proceeded as authorities of conciliation in all civil and administrative cases in which there was hope for the parties to reach an agreement. Besides, their sphere of authority would have included minor, personal claims up to 30 Ft, tresspass and in criminal cases the tasks of policeman and interrogator.

possible for the judge to attempt to settle a legal dispute or a certain question by agreement not only before the lawsuit but also at any time during it.

III. Development of Labour Court

Labour courts (Munkaügyi Bíróság) had to be first regulated after the First World War. The reason for this was that the crisis phenomena accompanying the transition from war to peace led to such radical mass movements (general strikes, seizure of factories, etc.) which had to be solved without delay. Due to the wave of strikes all over the country, the membership in trade unions in this period rose to a level twice as high as in 1914.

The 9180/1920 Decree of the Prime Minister referred lawsuits arising from employment relation between craftsmen and tradesmen and their workers in employment relation based on a civil law contract under the authority of labour courts. Labour suits usually belonged to the authority of district courts, a rule of competence was determined only for the area of Budapest. The rules of the district court had to be applied in labour suits with the consideration of the differences set forth in the decree.

As a result of the powerful action of trade unions, lay assessors representing the employers and the employees (1 person for each side) could also take part in labour courts in addition to the chairman, but the parties could also forbear from their employment. They were employed mainly when the district court was at the same time a social security court, or where it was ordered by the Minister of Justice. However, appeals against the judgements were invariably judged by the tribunal without the participation of lay assessors.

This regulation remained practically unchanged for two decades although the fate of the country took a great turn in the meantime. In spite of this it was suitable, even if not the most effectively, for handling the arising disputes. So in this period disputes arising from employment relations were settled in court instead of using alternative methods. The regulations tried to ensure the "transparency" of social relations in this way.

1. Decaying of labour courts

By the end of the 40s the so-called Soviet-type organisation of the state emerged, accompanied by all the state organs of a "different state". The regulations of labour jurisdiction underwent significant changes according to Act 1951:7, that is the Labour Code of that time. According to the new rules of law the board of arbitration, court and the subordination rule were set as possible methods for settling labour disputes. This meant that labour disputes were first discussed in a board of arbitration and then, if necessary, in court. The lawsuit could also be commenced by the employee – irrespective of the total value – in the district court competent for the place of work, and in lawsuits arising from employment relation the district court proceeded in accordance with the general rules of the Civil Procedure.

The Labour Code modifications of 1964 meant that the general competence of settling labour disputes was transferred to labour boards of referees and the court procedure was allowed only in exceptional cases. This decision was influenced by ideology, too, as this solution makes it seem as if a simple worker could actually take part in settling disputes. In practice, however, this active participation was well-controlled, in harmony with the total mentality of the period.

The narrow scope of movement was also well reflected by the limited possibility of appeal. The parties could appeal against the decision of the board of referees to the regional labour board of referees and a bill of review could be submitted to the district court only in four cases.

2. Establishment of Labour Courts

The comprehensive reform of the administration of justice carried out at the beginning of the 70s brought essential changes in the judgement of labour disputes, too. The changes effected in the law of civil procedure (Amendment of the Civil Procedure III) stated with general force that in labour disputes the entitled party could bring an action in the labour court against the decision of the labour (co-operative) board of referees, service superior or general assembly.

In 1972 the previous regional labour boards of referees were re-organised into labour courts and they have been operating as separate courts ever since.

The special rules applying to procedures in labour courts remained essentially unchanged for the following two decades. The minor modifications failed to remedy the greatest deficiency of the regulation of the actions ensuing from employment relation, that is the lack of the possibility to appeal. The Amendment of Civil Procedure III permitted the possibility to appeal only in two cases: against the resolution made with respect to the company's or the worker's financial responsibility.

Act XXII of 1992, the Labour Code in force and the related modification of the Civil Procedure brought fundamental changes in the rules of settling labour disputes. According to the new regulations the labour court could proceed only in lawsuits arising from employment relation or from employment relation-like legal relationships based on co-operative membership.

- At present the compulsory procedure of the board of referees is ceased in labour disputes and according to Section (3) of § 199 of the Labour Code the court proceeds in cases of labour dispute.
- A distinction is made by the Labour Code between collective labour disputes and legal disputes in employment relations.
- The restriction imposed on the possibility to appeal was ceased, and thereby the rules of labour lawsuits became more similar to the general rules.

3. Labour board of referees (Munkaügyi Döntőbizottságok)

The Labour Code modifications of 1964 referred the settlement of labour disputes to the labour board of referees with general competence and allowed turning to court

only in exceptional cases. In this respect the former Labour Code (Act II of 1967) did not bring essential changes, either.

The tasks and organisation of boards of referees are regulated by Act 29 of 1964 and Act II of 1967 on the regulation of certain questions concerning employment relation and by the decrees on their execution: "A labour board of referees has to be set up in each company and in its units in some other locality where a trade union organ operates. If the company employs a greater number of workforce, more than one labour board of referees may be set up, if necessary. As regards public service, the railway, the post, the armed forces, the armed bodies and organs of security forces as well as agricultural plants and companies or company units where a labour board of referees cannot be set up, the establishment of a labour board of referees can be regulated by the Minister of Labour in a different way."

In disputes arising in connection with the rights and obligations ensuing from the employment relation between the worker and the company – unless considered as an exception by law or by the Labour Code – the company and the regional labour board of referees or the court proceeded. The company board of referees proceeded on first instance and the regional board of referees on the second instance, while in cases determined by the Labour Code the district court proceeded.

The chairman and deputy-chairman of the *company labour board of referees* was appointed by the chairman of the regional labour board of referees, based on the common proposal of the company organ of the trade union and the company. The other members and alternate members were nominated in equal proportion by the company organ of the trade union in a number which ensured its smooth operation. The board of referees proceeded in each case in a board consisting of 3 members. The company was obliged to provide the material and personal conditions necessary for the undisturbed operation of the company labour board of referees.

The *regional labour boards of referees* were organised by counties and their operation was supervised by the Minister of Labour together with the National Trades Union Council. The material conditions required for the smooth operation according to the rules of procedure were provided by the executive committee of the county council, while in the case of a regional labour board of referees covering a larger regional unit these conditions were provided by the organ appointed by the Minister of Labour.

The chairman of the regional labour board of referees and the labour referees were appointed by the Minister of Labour in agreement with the National Trades Union Council, after consultation with the county council and the county council of the trade union. Its other members were elected by the county council of trade unions in the required numbers according to branches of industry.

The procedure of labour boards of referees was started by a complaint, which had to be judged by the board within 8 days of its submission. The boards decided about the complaint in a resolution in a board of 3, against which an appeal could be lodged to the regional board of referees within 15 days. In certain cases defined by law - on the basis of a bill of review - the district court proceeded on second instance. These cases included primarily labour disputes arising in connection with injuries to the worker's life, health and bodily integrity or concerning the compensation for damage done by the worker through criminal damage, etc. Moreover, separate rules applied to the formation and termination of the employment relation of judges, state attorneys and

detectives of the state attorney's office, as well as to disputes arising in connection with social security.

Decree 2/1969 (II.2.) of the Ministry of Labour prescribed the obligation of taking an oath for the chairmen and for the members of labour boards of referees .

The system of labour boards of referees was dissolved by the new Labour Code in 1992.

III. The alternative dispute resolution system under the labour law in force

The labour disputes, among them alternative dispute resolution methods, are regulated in the Hungarian Labour Code in force. The solutions of labour disputes can be divided into two groups: a) interest disputes (or in other words collective labour disputes) and b) legal disputes (or other words individual labour disputes). Some of the internationally known alternative dispute resolution methods were incorporated into the newly enacted Labour Code in 1992. The types of the alternative (or appropriate) dispute resolutions are as follows: a) mediation b) conciliation and c) arbitration.

1. Type of ADR technics for collective labour disputes

1.1. Conciliation

In a dispute arising in connection with employment between the employer and the factory council or between the employer (the organisation representing the employer's interests) and the trade union that does not qualify as a legal dispute (collective labour dispute), there shall be *conciliatory negotiations* between the parties concerned. Conciliation commences upon the submission of the initiating party's written position to the other party. During the period of conciliation, which can be a maximum of seven days, the action serving as the basis of the dispute shall not be executed, and furthermore, the parties shall refrain from all acts that may endanger agreement.[231]

1.2. Mediation

With a view to settling the conflict, the parties may avail themselves of the mediation of a person independent of them and not involved in the conflict. The participation of the mediator is jointly requested by the parties. For the duration of conciliation the mediator may request information or data from the parties to the extent he/she thinks necessary. In this event, the deadline of seven days will be replaced by a deadline prescribed for the provision of information or data, but the extension cannot exceed five days.

Upon completion of conciliation, the mediator will put the parties' positions and the results of the conciliation in writing and deliver them to the parties.[232]

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[231] Articles 194 of the Act XXII of 1992 on Labour Code.

[232] Articles 195 of the Act XXII of 1992 on Labour Code.

1.3. Arbitration

The parties may, on the basis of an agreement, avail themselves of an arbitrator to settle a labour dispute. The decision of the arbitrator is binding if the parties have in advanced subordinated themselves in a written statement.

The arbitrator may set up a conciliation committee, to which the parties delegate an equal number of representatives.

The arbitrator's procedure is obligatory in regard to disputes arising in connection with *a)* trade unions' right to publicity,[233] *b)* the cost of the operation of woks council,[234] and *c)* the works council's right to joint decision[235] in the event of an absence of understanding.

An agreement that has come into being in the course of conciliation or the arbitrator's decision is qualified as a collective agreement.

In the course of conciliation and arbitration, in agreement with the parties, experts or witnesses may be consulted.

Justified and necessary expenses arising in connection with the conciliation and the arbitration process are borne by the employer in the absence of agreement departing therefrom.[236]

2. The legal labour dispute

With the intention of asserting claims that arise from employment, the employee, the trade union and the factory council may initiate a legal dispute under the provisions of the Hungarian Labour Code against an action (omission) of the employer in violation of the regulations pertaining to employment.

Unless the Code stipulates otherwise, the employer may initiate a legal labour dispute towards the assertion of his/her claim related to employment.

A court of law (labour court) decides legal disputes in employment relations.

A legal dispute in labour relations may be initiated against a decision adopted by the employer within his/her right of deliberation in the event that the employer has violated standard regulations in the course of making his/her decision.

The parties may seek conciliation prior to going to court (preliminary conciliation), if they agreed in advance about the conciliation in collective agreement or in employment agreement. Besides the preliminary conciliation during the court process negotiation can take place between the parties at any time. In the course of conciliation

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[233] Article 24, "The employer ensures opportunity for the trade union to make public information and appeals that it regards as necessary as well as the data related to its activities in a manner customary with the employer or in another appropriate way. By agreement with employer, the trade union is entitled to use the employer's premises after or during working hours for the purpose of activities that represent its interests."

[234] Article 63, "The employer ensure the justified and necessary costs for the election and operation of the factory council. The extent of this is jointly determined by the employer and the factory council. In the event of dispute, there is conciliation."

[235] Paras (1) of Article 65, "The works council has right of joint decision in regard to the utilization of welfare money specified in the collective agreement and in regard to the utilization of institutions and property of this nature."

[236] Articles 196-198 of the Act XXII of 1992 on Labour Code.

or negotiation, any accord reached by the parties qualifies as an agreement, which has to be put in writing.

If conciliation has not yielded results, it is then, with the exception of those provisions contained in Article 202 of Labour Code, possible to turn to a court of law. With certain exceptions[237] a law suit does not have the force to delay the implementation of a measure.

A law suit may be initiated within the term of limitation of the establishment of the failure of conciliation, or within 30 days of the below mentioned actions:

a) a work contract modification implemented with the employer's one-sided action;
b) the cessation of employment, including termination based on mutual consent;
c) extraordinary notice and legal consequences[238] applied on account of the employee's breach of obligation;
d) payment notice[239] and a ruling prescribing compensation.[240]

If the employee files his/her suit against termination of employment or against legal consequences applied by the employee on account of a violation of obligation after the lapse of six months, he/she will not demand the restoration of his/her employment or his/her employment in the original position or work place. Furthermore, he/she can put in a claim only for wages for the six months preceding the filing of the suit.[241]

As we could see within the Hungarian labour legislation the so called alternative dispute resolution method is not yet widely accepted. We believe that in the future this situation will change in favour of these methods, which help to settle the labour dispute more appropriately.[242]

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[237] See Article 23, Article 67, and points c) and d) of para (1) of Article 202 of Labour Code.

[238] Article 109, "In the event of a grievous viloation by the employee of obligations arising from employment, the collective contract may, in addition to specifying the rules of procedure, also establish legal consequences in addition to those contained in Labour Code (para (1) Article 96). The collective contract only establishes, as a detrimental legal consequence, those disadvantages attached to employment that do not violate the employee's personal rights and human dignity. A pecuniary fine shall not be prescribed as a detrimental legal consequence. There is no measure containing detrimental legal consequences in relation to an employee if one year has already elapsed since the reprehensible breach of obligation. A measure entailing detrimental legal consequences is only carried out in a ruling justified in writing, which shall also contain information about the opportunity for legal redress. In a procedure aimed at the implementation of detrimental legal consequences, it is ensured that the employee be able to present his/her defence and to avail him/herself of a legal representative."

[239] Article 162, "In the event of the payment of wages without a legal basis, this may be reclaimed from the employee in writing within sixty days. Wages paid without a legal basis may be reclaimed within the general time for prescription, if the employee has recognized the lack of basis for the payment or if he/she him/herself caused it. The employer may assert its claim, by written notice, that the employee should repay the debts connected with his/her employment."

[240] Para (2) of Article 173, "A collective agreement may determine the value to the extent of which the employer can directly oblige the employee to pay compensation. In this case the standard procedure for making compensation is also established."

[241] Articles 199-202 of the Act XXII of 1992 on Labour Code.

[242] József Hajdú: The Methods of Alternative Dispute Resolution (ADR) in the Sphere of Labour Law, Acta Juridica et Politica Tomus LIV., Fasciculus 8., Szeged, 1998 pp. 72-74.

IV. The Hungarian Mediation and Arbitration Service

1. Creating the Service's operating conditions

The Hungarian Mediation and Arbitration Service (hereinafter: HMS) was not created by a law, but rather by an agreement on the NCC's Feb. 16, 1996 meeting, therefore the HMS' legal status is still unsettled. The HMS is currently under the jurisdiction of the Ministry of Labour, however, the NCC agreement allows it to operate as a fully independent institution. In the past one year, the NCC members did not interfere with the Service's operation and did not violate the their agreement.

The financial conditions for operation are provided by the Government through the state budget which appropriated the NCC Secretariat HUF 10.100.000 for 1997 in the Ministry of Labour chapter. These funds are used to pay mediator/arbitrator fees, salaries of the three staff members, office rent and the costs of continuous operation (electricity, telephone, car, office supplies, post etc.). The Service's Secretariat currently has good technical and tangible equipment, but this primarily due to PHARE aid and other conditions ensured by the Ministry of Labour. In addition to the above mentioned compulsory expenses, its budget was mainly used to pay for mediator/arbitrator training related costs.

In the past year HMS also completed the administrative tasks – extremely important from an operation aspect – stipulated by its Operation and Procedure Regulation. Thus, it prepared a service file for each colleague, registration forms for recording cases and training records etc.

The Service Secretariat – following establishment – rather quickly developed the fast and effective internal reporting and liaison system. One of the system's important elements is the "Békéltetõ" *(The Reconciliatior), a* publication in which HMS not only publishes information on events, programs and training possibilities, but in the supplement it publishes reports/studies.

2. Training the Service members

Base training for mediators/arbitrators is prescribed by the Service's operation and procedure regulation. Furthermore, all colleagues admitted to the list assumed the obligation of attending base training organised by the Service.

The training course had *two objectives:*

1. Provide know-how, offer methods and procedures to the participants and practising these.

2. Establishing friendly and professional relationships within the Service, as well as creating work teams which operate as professional workshops even after the training.

Since the mediator, arbitrator "profession" was unknown in Hungary, the HMS had to entrust foreign institutions which have both mediator and training experience. It was a great assistance, that the American FMCS provided base training for all mediators stated on the list, which was well supplemented by the British ACAS and Belgian Ministry of Labour's base level but not totally "beginner" mediator training.

The HMS feels that aside from its own internal training, it would have been necessary to inform, prepare and train potential clients on the Service's mission, goals, procedure, who the mediators/arbitrators are. However, neither the unions nor the employer organisations were very interested.

3. The operation of the Hungarian Mediation and Arbitration Service

In the past years, the Service concentrated its work on the following four areas:

1. Offering assistance in known conflicts (interest disputes, collective disputes) or providing mediation/arbitration services upon request.

2. Establishing the HMS organisation, creating conditions for operation.

3. Making the Service known, popular.

4. Organising base training for the mediators/arbitrators contained in the list.

3.1. Settling labour disputes: mediation, arbitration

Since its founding (1996), the Hungarian Mediation and Arbitration Service handled 30 cases. *(Statistics prepared on the cases are contained in Appendix 1.)* Of this, in 14 cases either of the disputing parties turned to HMS for assistance and in 6 cases they jointly requested its help. In the other cases (10) the Service Director and Secretary contacted the participants of the labour disputes based on reports published in newspapers and electronic media. Of the 30 cases, 18 cases fell under the HMS' jurisdiction based on the disputes. Of these in six cases, the participants of four disputes jointly requested the Services' assistance on location (Szekszárdi Meat Processing Rt., Szolnoki Bakery Co., Szolnoki Furniture Manufacturing Limited, and the Karacs Teréz High School Girl's Dormitory).

In 12 cases of the remaining 18, the HMS would have had the right to take action, but either its services were not requested or due to a strike threat and the internal conflict management mechanism (in most cases this was regulated in the collective agreement) within the work place this was not possible.

In two cases, the owners turned to the HMS requesting assistance in settling disputes. In the other 9 cases, the Service's assistance was requested in resolving individual disputes and in 1 case the Service helped properly execute a works council election. The HMS succeeded in asserting its principle, that whoever turns to it for help, be that either industrial disputes or individual legal dispute, it shall always listen and provide advice on who to turn to or what to do.[243]

3.2. Why wasn't the Service's assistance requested more frequently?

a) Primarily because the Service is not well known. It is almost certain, that the majority of those who turned to it were not informed of HMS' founding through the Magyar Közlöny (Hungarian Gazette), but rather from some other source e.g. TV,

[243] Report to the National Conciliation Council on the period of July1, 1996-July 1, 1997; by The Labour Mediation and Arbitration Service, Hungary, Budapest, 1997 pp. 3-5.

radio, newspaper, various lectures, briefings, trade journals etc. Its successful work at the Szekszárd Meat Processing Co. in 1996 summer briefly put the HMS in the limelight.

b) In the past year, few collective disputes were made public. The HMS collected articles from national newspapers and magazines, which reported on strike threats, strikes and other disputes between employers and employees in the period following July 1, 1996. Based on the articles, most of the conflicts - due to the effects of strike threats (in the initial phase of placing pressure) and publicity - never got as far as demonstration or walk out. To the best of HMS' knowledge, during the reporting period there were 9 strike threats in the country and 5 warning and general strikes, of these one was only a two hour warning strike. In the remaining four cases, there were 3 walk outs in Szekszárd and one in Szolnok. The Service was asked to mediate in both Szekszárd and Szolnok.

c) There are only a few workplace or sector level collective agreements. In Hungary, industrial relations in the workplace have low standards, there is practically no employee interest representation at small and medium sized companies, the unions in certain fields/professions have almost completely ceased. Naturally there are no collective agreements at these places of employment and cannot be, because as per the regulations in effect only the union can conclude such contracts with the employer. Interest disputes are difficult to manifest at these places of employment, because the employer does not have a partner with whom it can develop and operate collective industrial relations.

d) The employer does not always appreciate the participation of a third-party in the dispute with the employee, because it fears that the mediator may obtain information which, if leaked, might violate the company's business interests and undermine its position during negotiations. If a conflict does occur within the workplace, naturally they first try to resolve the problem "internally". If this is not successful, then the trade or sector unions are brought in on the employee side. It is important for the unions to be involved and successfully resolve the conflicts, because their prestige increases among the members. In the HMS' opinion, this type of union behaviour is only natural. If even they are incapable of resolving the interest dispute, only then can an external independent party brought in, who e.g.- if they know that the Service exists - may also be one of HMS' members.

Based on the above four reasons, we can state that the economic and social transformation causes much tension in the Hungarian labour market. The majority of labour interest disputes do not reach the strike phase, but are resolved earlier in some manner. Perhaps this would explain that in the first year of the HMS' operation it registered 30 cases. These are not a big deal. However, the leadership of HMS knows, that only with great patience, persistent, steadfast work, greater openness and assistance from social welfare partners, can HMS' services accepted by the workplace unions and employers.

4. Future tasks

A. Based on the experiences of the past year, it would be necessary to make a few modifications to the Service's goal and task system. In addition to providing mediation or arbitration services – upon request – in evolved labour disputes, to also emphasise

- *preventive mediation*
- *on-site open or public consulting* to established civilised industrial relations,
- assisting workplace problems (labour, economic etc.) through team work, etc.

B. The government – in agreement with the social partners – shall sort out the Service's legal status. Create a law which determines the HMS legal situation, its relationship with the NCC, financing and personnel and material conditions of operation. So far, the Rules of Operation and Procedures of HMS was accepted by NCC in March 31, 2000. There is a basic problem relating to the Procedures. Namely, it was not enacted as a legal rule.

C. In addition to preparations for traditional mediation and arbitration tasks, *preventive mediation, consulting and team work* should also be given priority.

D. The Service should improve its PR work. Continue developing its *briefing* strategy started with the help of the US Department of Labour, make preparations for publishing brochures facilitating workplace partner relationships.

E. The Service should continue to maintain its international relations established in the first year, make use of the received know-how and incorporate what it can into its own work. At the same time take advantage of its position, that it can play a determinant role in Eastern Europe in passing on the Hungarian model.

Summary

Finally, we would like to touch upon four seemingly different issues, which are somehow rolling around one common topic: the ADR system.

A. Trust in judge (court), but wish to solve the problem informally. One of the main difficulties of ADR is that majority of the persons trust only in court decision and process, but at the same time they want to solve their disputes as close, cheap and fast as possible for their own circles. This discrepancy leads them to think about ADR, but at the same time they do not trust in it really. We have to solve this problem and let them think about using on their trust the different ADR systems.

B. Vindicating only rights, instead of solving the problem. There are, no doubt, a plethora of reasons contributing to a particularly litigious society. A significant factor is that contemporary morality often values the vindication of rights over the balance of compromise. For example, the Canadian Charter of Rights and Freedoms has, with its guarantees of individual rights, encouraged the citizen to believe that one really can fight City Hall and win.

C. Plural system. In consideration of the previous chapters, our view is that, wherever court-based adjudication is designated, an attempt should be made to make other methods also available. This implies that other methods are not advocated to supplant adjudication, but rather that these methods are available next to adjudication.

Our recommendation for a co-existing plurality of dispute settlement institutions stems from an appreciation of the strengths and weaknesses of both court-based adjudication and other methods of dispute settlement. The acclaimed advantages of adjudication as well as the other methods can easily turn into the reverse, depending on the personae and circumstances of the parties, and the characteristics of the dispute at hand. Where autonomy is sought, for example, the authority of a judge may be needed instead. Proceeding in public accompanied by publicity may be desirable for particular litigants, but it can be extremely burdensome for others. In some cases there may be a need to establish a precedent in law, whereas in others mere application of pre-existing norms would only hinder a pragmatic solution desired by both parties.

Therefore, the central question should be which method of dispute resolution is most suitable considering the parties and the dispute at hand.

In our view it is difficult to lay down hard and fast rules as much depends on the parties and their problems. Nevertheless, conscientious attempts at drawing up some "do's and don'ts" have been made by other specialised institutions.

We do not subscribe to the widely accepted theory, that disputes over rights are to be settled through adjudication only, and disputes over interests through any of the other methods such as conciliation. One argument to support this is that the law itself does explicitly allow for disputes over rights to be taken out of the judicial process. Provisions thereto can be found in the domestic laws of the legal systems under review, as well as in international legal standards, such as the European Convention on Human Rights.The law itself does not give the courts the monopoly of the legal dispute

market. In addition to this somewhat formal argument, we submit that it may be practically difficult to separate interests out of rights.[244]

D. Problem of legal education. Another important and perhaps more significant factor, because it is within societal control, is the system of modern legal education which is unrelenting in its inculcation of the adversarial approach to dispute resolution. The result is that modern legal education often produces lawyers trained in a confrontational spirit which undermines and ultimately ignores innovations aimed at the early settlement of disputes. The primary goal of winning the case often blinds lawyers to the financial and emotional cost to the client.

Law schools, therefore, must foster an atmosphere of conciliation by emphasising such methods as mediation, negotiation, and arbitration as means of resolving legal disputes. The curricula should give weight to the values of balance and compromise to complement the vindication of rights as the sole principle of dispute resolution. Instead of placing all the emphasis on trial practice, some of the student's time should be devoted to settlement techniques. More of the budding litigant's time in practice will be spent in settling than in trying cases. The governing bodies of the law profession can help with this task by establishing continuing legal education programs.

In this paper we intended to introduce the basic elements of ADR systems, and also demonstrate briefly how it works in countries, with different legal and cultural background. Some type of ADR technics are not unknown in Hungary, therefore, we hardly believe that it could widespread in Hungary as well.

[244] Annie de Roo and Rob Jagtenberg: Settling labour disputes in Europe, Kluwer, 1994. pp. 35-36.

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HAJDÚ JÓZSEF

AZ „ALTERNATÍV VITAMEGOLDÁS" ALKALMAZÁSA A MUNKAJOGBAN NÉHÁNY EURÓPAI UNIÓS ORSZÁGBAN ÉS MAGYARORSZÁGON

(Összefoglalás)

Külföldön és hazánkban egyre nagyobb problémát jelent a bíróságok telítettsége és ebből adódóan a peres ügyek elhúzódása. Az ítélethirdetésig évek telhetnek el, jelentős költségtöbbletet okozva ezzel a feleknek, a vita pedig hosszú ideig megoldatlan marad. Több vonatkozásban felmerülhet a kérdés, hogy miként lehetne ezt a problémát orvosolni.

Az egyik lehetséges megoldásként az ún. ADR (Alternative Dispute Resolution vagy „alternatív vitamegoldás", továbbiakban: AVM) kínálkozik. Az AVM önkéntesen választott vitamegoldási technikák rendszere, melyeknek közös célja, hogy a konfliktust a lehető leggyorsabban, a felek kölcsönös megelégedésére rendezzék, lehetőleg a hosszú és költséges bírói út elkerülésével. Az így alkalmazott legtöbb módszer egyáltalán nem újkeletű. Az elmúlt időszakban ezt a technikát több országban újra „felfedezték". Az AVM a legtöbb esetben csak apró részletekben különbözik egy már meglévő konfliktusmegoldó módszertől. Az AVM lényege, hogy a felek mindig az adott konfliktushelyzetnek legmegfelelőbb technikát választhatják ki. Ez pedig rendszerint gyorsabb és olcsóbb vitamegoldást eredményez. Ez a „mozgalom" számos látható és kedvező eredményt hozott, főként a gazdasági és kereskedelmi jog, az egészségügyi jog és nem utolsósorban a munkajog területén.

Az AVM Magyarországon sem ismeretlen, sőt néhány technika alkalmazása a gazdasági, illetve a kereskedelmi jogban kifejezetten – történeti távlatokban is – gyakorinak mondható. A nálunk ismert és alkalmazott módszerek azonban az AVM-nek csak nagyon kis szeletét jelentik.

Több ország eddigi gyakorlata bebizonyította, hogy az AVM nagyon jól alkalmazható munkaügyi konfliktusok megoldására. Magyarországon az AVM alkalmazása nem hagyományok nélküli, ugyanakkor a munkaügyi konfliktusok megoldásánál napjainkban még viszonylag ritkán alkalmazott módszer.

Jelen munkánk *első részében* az Európai Unió néhány – e tárgy vonatkozásában meghatározó – tagállamában működő AVM-ek bemutatására kerül sor. Külön-külön tárgyaljuk Belgium, Dánia, Franciaország, Németország, Nagy-Britannia, Görögország, Olaszország, Írország, Luxemburg, Portugália, Spanyolország, Svédország fontosabb AVM-rendszereinek a kialakulását, jogi szabályozását és működési mechanizmusait.

Munkánk *második részében* a magyar AVM-rendszerrel foglalkozunk. Az első fejezetben a magyar rendszer történeti kialakulását tekintjük át. A második fejezetben a munkaügyi bíráskodás kialakulását és fejlődését mutatjuk be röviden. A harmadik fejezetben a hatályos munkajogi szabályozás keretében működő alternatív vitamegoldási rendszereket tárgyaljuk. A negyedik fejezetben a Munkaügyi Döntőbírói és Közvetítői Szolgálat szerepét vizsgáljuk meg.